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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 125

WAYNE HARSH, PETITIONER,

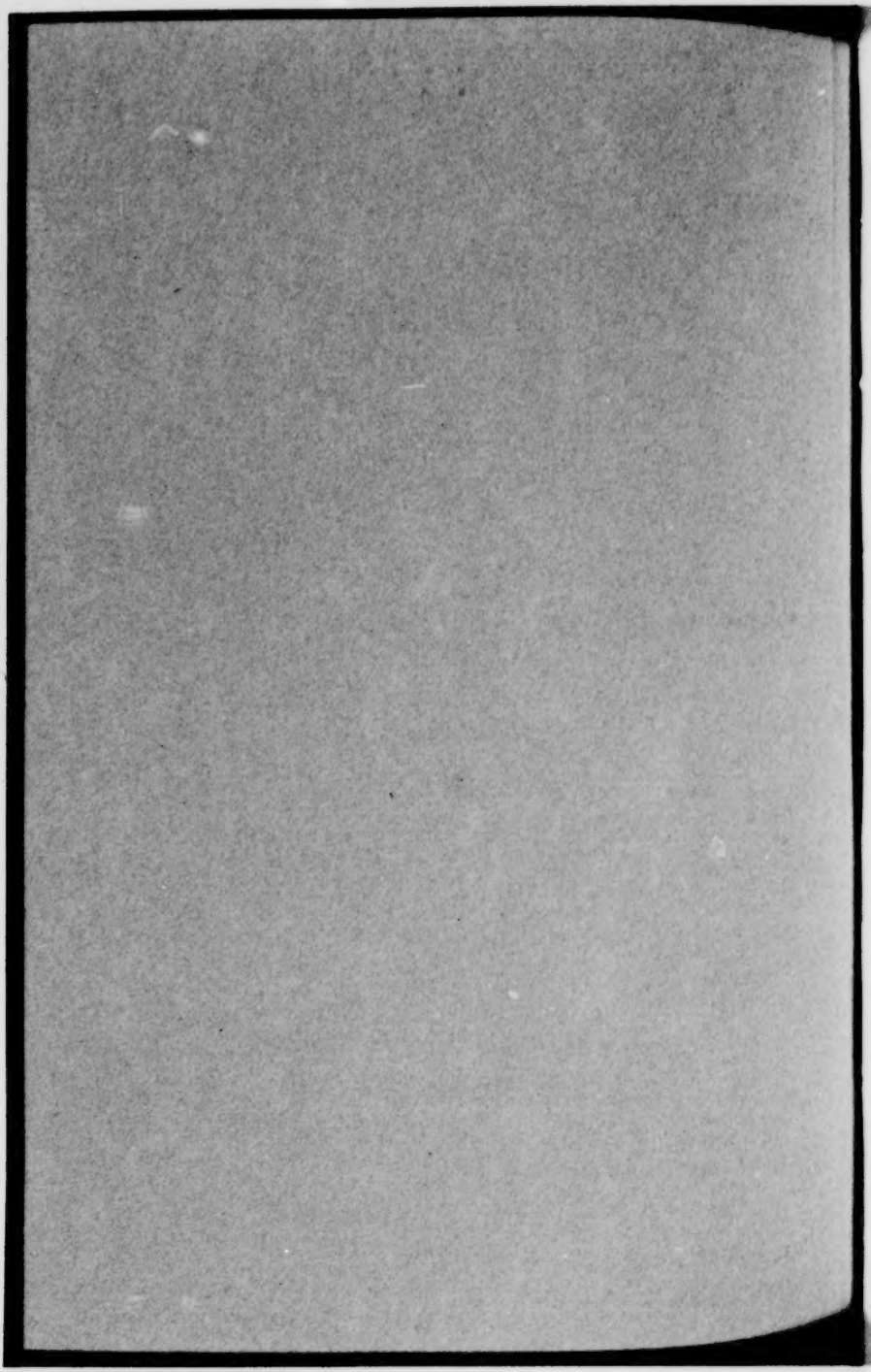
vs.

ILLINOIS TERMINAL RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

PETITION FOR CERTIORARI FILED JUNE 7, 1954

CERTIORARI GRANTED OCTOBER 18, 1954



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ILLINOIS TERMINAL RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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IN THE SUPREME COURT OF ILLINOIS

March Term, A. D. 1954

WAYNE HARSH, Plaintiff-Appellee,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY, a Corporation, Defendant-Appellant

Petition for Leave to Appeal from the Appellate Court, Fourth District

There Heard on Appeal from the Circuit Court of Madison County

Honorable Quinten Spivey, Trial Judge

PETITION FOR LEAVE TO APPEAL—Filed December 29, 1953

Statement of Facts

Because this case comes to this Court, solely on a legal question, that is, does a reviewing court in an action under the Federal Employers' Liability Act or Federal Safety [fol. 2] Appliance Act, have the power to hold a jury verdict against the manifest weight of the evidence, there need be but scant reference to the facts.

Reference to the sequence of events leading to this petition will suffice.

Plaintiff, Wayne Harsh, brought suit against the defendant, Illinois Terminal Railroad Company, in the Circuit Court of Madison County, Illinois, for injuries received while in the employ of the latter company. His action, was based on a contention that defendant had furnished him with a defective retriever, in violation of the Federal Safety Appliance Act, a companion act to the Federal Employers' Liability Act.

The jury found in favor of plaintiff and awarded him a verdict of Twelve Thousand Dollars ($12,000.00), and the

trial Court after denying defendant's motions for new trial and for judgment notwithstanding the verdict entered judgment on the verdict in favor of plaintiff. Defendant appealed to the Appellate Court for the Fourth District.

The Appellate Court held, that plaintiff had made a jury question, but that the verdict of the jury was against the manifest weight of the evidence, and reversed and remanded the cause for a new trial.

On plaintiff's petition for rehearing, setting up the fact that the Appellate Court was without authority, under the governing Federal rules of law to hold the verdict against the manifest weight of evidence, the Appellate Court by [fol. 3] inference allowed the petition at the same time denying it.

For the Court, wrote an additional opinion specifically denying the petition and relied upon its "historical power to reverse and remand a case for new trial when it believes the verdict to be against the manifest weight of the evidence," for so doing.

Plaintiff, then pursuant to Rule 75 (c) of this Court, struck the remanding clause of the Appellate Court's judgment, thus making it final, and now seeks leave to appeal from a such final judgment, again raising the question of the right of the Appellate Court, under the governing Federal authority, to hold plaintiff's verdict to be against the manifest weight of the evidence.

[fol. 4] Points, Authorities and Suggestions

In actions under the Federal Employers' Liability Act the right of the parties are governed by the construction of the Act given by the Courts of the United States and are not governed by local rules of law in the various states.

Bailey v. Central Vermont Ry., 319 U. S. 350, at 352;
Ellis v. Union Pacific Railroad, 329 U. S. 649, at 653;
Williams v. New York Central Railroad, 402 Ill. 494, 84 F. 2d 399, at 405;
Grosse v. Terminal R. Ass'n. of St. Louis, 307 Ill. App. 414, 29 N. E. 2d 1018, at 1022;

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The Appellate Court Court had no authority under the Federal law governing this cause to hold a submissible case as against the manifest weight of the evidence.

Tennant v. Peoria & Perkin Union Ry. Co., 321 U. S. 29, at 35;
Ellis v. Union Pacific Ry., 329 U. S. 649, at 653;
Lavender v. Kurn, Trustee of San Francisco Ry. Co., etc., 327 U. S. 645, at 652;
Witherbee v. Elgin, Joliet & Eastern Ry. Co., (C. C. A. 7th C.), 191 Fed. 2d 302, at 308;
Stanczak v. Pa. Ry. Co., 174 Fed. 2d 43, at 47;
Stanford v. Pa. Ry. Co., 171 Fed. 2d 632, at 634;
Bolin v. Lehigh Valley Ry. Co., 167 Fed. 934;
Henwood Trustee of St. L. Southwestern Ry. Co v. Chaney, 156 Fed. 2d 392, at 398;
Boston & M. R. R. Co. v. Cabana, 148 Fed. 2d 150, at 153;
[fol. 5] Waddell v. Chicago E. I. Ry. Co., 142 Fed. (2d) 309, at 309;
Chapman v. Alton Ry. Co. (C. C. A. 7th Cir.), 117 Fed. 2d 669, at 672;
Grand Trunk Western Ry. Co. v. Heattie, 48 Fed. 2d 759, at 761;
Williams v. N. Y. C. R. R. Co., 84 N. E. 2d 399, at 405-406;
Nickell v. B. & O. Ry. Co., 106 N. E. 2d 738, at 741, 347 Ill. App. 202 (4th Dist. of Ill.);
Grosse v. Terminal R. R. Ass'n. of St. Louis (4th Dist. of Ill.), 307 Ill. App. 414, 29 N. E. 2d 1018, at 1022.

Plaintiff's action being under the Federal Statute, was governed by the construction of the act by the Federal Court. Local rules of law are not controlling in suits instituted in state courts and must yield to Federal rulings.

The foregoing rule is I believe generally accepted and is backed by ample authority.

Just a few references to the holdings of the United States Supreme and Circuit Courts of Appeal and the Supreme and Appellate Courts of this state will amply corroborate this statement.

In Bailey v. Central Vermont Railway, 319 U. S. 350, the Court said at page 352:

> "Section 1 of the Act makes the carrier liable in damages for any injuries or death resulting in whole or part from the negligence of any of its officers, agents, or employees.
> [fol. 6] "The rights which the Act creates are Federal rights protected by Federal rather than local rules of law (Citing authorities)."

In Ellis v. Union Pacific Railroad, 329 U. S. 649 at page 653, the Court said, in regard to the standard of negligence liability in cases under the Act:

> "Whether those standards are satisfied is a Federal question, the rights created being Federal rights (Citing authorities)."

In Williams v. New York Central Railroad, 402 Ill. 494, 84 N. E. 2d 339 at 405, this Court notes that this rule of law is applicable and cites some of the United States Supreme Court cases, already noted.

In Grosse v. Terminal R. Ass'n. of St. Louis, 307 Ill. App. 414, 29 N. E. 2d 1018, the very Court which reversed the case at bar, that is, the Appellate Court for the 4th District, at page 1022 of the Northeastern Reporter recognized this rule and said:

> "Therefore, state courts are bound by the decisions of the Federal Courts in such actions." (Citing authority.)

I do not believe that there can be any dispute about the Federal Courts ruling on points of law being binding on the state courts, and of course, this court is cognizant, that the Supreme Court of the United States has the power by certiorari to review the final holdings of the state courts in cases of this type.

As has been noted, the Appellate Court in the case at bar held plaintiff had submitted a sufficient case for the jury, [fol. 7] but that the verdict was against the manifest weight of the evidence. In this latter portion of the holding, the authorities clearly indicate it was in error.

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Supporting its authority to so hold, the Appellate Court cited the single case of Robertson v. Louisville N. R. Co., 327 Ill. App. 44, 63 N. E. 2d 608, a case which the same court had previously decided in 1945.

It is interesting to note, that this case has never been since cited on any point (excluding the reference made to it in the opinion in the case at bar) and in the opinion, no Federal authority is cited to sustain the right of the Court to set aside the verdict. In fact, the court there was guilty of the same error as here, because it overlooked and misinterpreted the Federal cases specifically denying the right to hold the verdict as being against the manifest weight of the evidence.

What is amusing about the Court's holding is, that except for its erroneous holding in the Robertson case (327 Ill. App. 44), supra, this very Court has passed upon two Federal Employer cases and followed the correct federal rule.

First in Grosse v. Terminal R. Ass'n. of St. L., 307 Ill. App. 414, 29 N. E. 2d 1018, at page 1022 of the Northeastern Reporter, the Court said:

> "*The federal courts have held that the fact that the verdict and judgment are against the weight of the evidence are not for the determination of an appellate court.*" (Citing authority.) (Emphasis ours.)

[fol. 8] Yet, this same court would come along in the present case and state, in denying plaintiff's petition for rehearing, that there is language in the authorities therein cited by plaintiff which support plaintiff's contention, but "none which removes the reviewing courts' historical power to reverse and remand a case for new trial when it believes the verdict to be against the manifest weight of the evidence."

No one denies the appellate court the clear right afforded it by statute [Sub. para. 3 (b), section 216, Chapt. 110, Ill. Rev. Stat.]to set aside a verdict as being against the manifest weight of the evidence in cases governed by state law. However, the case at bar is governed by federal rules of law, and this the appellate court failed to comprehend.

As has been noted, this very appellate district court has approved the true federal rule applicable to this cause.

Again, in Nickell v. Baltimore & O. R. Co., 106 N. E. 2d 738, 347 App. 202, this same Court, which reversed the case at bar, with the writer of the opinion in the case at bar, concurring with another justice (one Justice dissenting), announced and followed the correct rule in this type of case, saying at page 741 of the Northeastern Reporter:

> "Under the circumstances, questions of contributory negligence of defendant Railroad Company were questions of fact for determination by the jury. Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497; Tennant v. Peoria & P. U. R. R. Co., 321 U. S. 29, 64 [fol. 9] S. Ct. 409, 88 L. Ed. 520; Williams v. New York Central R. R. Co., 402 Ill. 494, 84 N. E. 2d 399. We cannot say under the facts before us that the verdict of the jury was not supported by the evidence and a directed verdict, under the facts in the record, would have been improper. Wilkerson v. McCarthy, supra; Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916. *Once an evidentiary basis has been established for the jury's verdict the Court is required to uphold such* ***conclusion, even though such Court might draw*** *contrary inferences or feel that another conclusion is more reasonable.*" (Emphasis ours.)

In denying plaintiff's petition for rehearing, the Appellate Court noted several cases cited by plaintiff in his petition, and stated that none of these cases specifically passed upon the question of the right of the Appellate Court to reverse on the question of manifest weight of the evidence, and that, thus, these cases could not be considered controlling.

It is true, the cases so noted do not specifically pass on this question, because it was not an issue specifically presented in those particular cases. What the Court did say, time and time again, in those cases, as will be hereinafter noted, was, that the Appellate Court's function in reviewing cases arising under the acts was limited to determining if there were sufficient probative facts to require submission to a jury of the issues; once this is determined, then the

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Court has exhausted its function and it can in no way weigh the evidence, nor draw a different inference from that of the jury.

[fol. 10] Here, the Appellate Court held plaintiff had made a sufficient case to submit to the jury, and having done so, under the federal rule its appellate function was completed.

There are cases not only in this state (Grosse v. Terminal R. R. Ass'n of St. Louis, 307 Ill. App. 414, 29 N. E. 2d 1018, at 1022, previously cited) but also in the federal reports which have passed squarely upon the right of a reviewing court to hold a verdict under the Federal Employers' or Safety Appliance Acts as being against the manifest weight of the evidence.

All of these (I challenge defendant to cite one to the contrary) have consistently held that the Appellate Court has no such right.

In Henwood, Trustee of St. L. Southwestern Ry. Co. v. Chaney, 156 Fed. 2d 392, at 398, the Court said:

> "The appellant in its brief presents argument relating to *inconsistencies in the testimony of plaintiff's witnesses and to weight of evidence and credibility of witnesses. But the jury has passed on these questions and we are bound by its decision.* Tennant, Adm'x, v. Peoria & Pekin Union R. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520." (Emphasis ours.)

In Grand Trunk & W. Ry. Co. v. Heatlie, 48 Fed. 2d 759, at 761, the Court said:

> "The contention that the verdicts are against the weight of the evidence cannot be considered as this court can go no further than determine whether there [fol. 11] is substantial evidence to support them."

In Chapman v. Alton Ry. Co., 117 Fed. 2d 669, the Circuit Court of Appeals, for this Circuit, the seventh, had occasion to pass on this precise question. At page 672 of its opinion the Court said:

> "By assignment of error the plaintiff urges reversal on the ground that the verdict of the jury was against the manifest weight of the evidence. The duty of this

court under this assignment is limited to ascertaining if there was any substantial evidence to support the jury's verdict. The credibility of the witnesses, the inferences to be drawn from proven facts, the weight to be accorded the various items of evidence were exclusively for the jury. The rule to be followed is too familiar to warrant extended discussion." (Citing authority).

As we have seen, the federal and state courts have unequivocally refused to permit an appellate court to interfere with a verdict on the contention that it was against the manifest weight of the evidence.

The Appellate Court for the Fourth District of Illinois, whether it wishes or not to be, is governed by this rule, and it erred grievously in setting aside the verdict in the instant case, on such grounds, in contravention of the governing law.

The following cases, while they do not pass specifically upon the question of interfering with a jury verdict, on the [fol. 12] basis of manifest evidence, because that point was not involved in the respective cases, do delineate the power of an appellate court in cases arising under the act.

As will be noted, and as has been already mentioned, this power is solely, to determine if there is sufficient evidence to warrant submission of the case to the jury. Once this has been determined favorably to plaintiff, the reviewing court has spent its power to interfere with the jury verdict.

If we will just keep in mind that plaintiff's suit is a Federal right, arising under Federal statute, brought in the state court solely because same is a permissible forum, but nevertheless governed by federal law rather than local, any confusion about the court's authority will be eliminated.

Actually in this situation the state court is sitting as a federal court trying a federal case, governed by federal law, and is likewise true of a reviewing state court. Much of the confusion which arises in the litigation of cases under the Employers' Act could be obviated if this simple formula were persistently kept in mind.

Following are just a few of the cases of the Supreme Court of the United States and of this court in which the true federal rule has been enunciated:

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In Tennant v. Peoria & Pekin Union Railway Co., 321 U. S. 29, at page 35, the Court said:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take [fol. 13] the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & G. R. Co. v. McDade, 135 U. S. 554, 571, 572, 34 L. Ed. 235, 241, 242, 10 S. Ct. 1044; Tiller v. Atlantic Coast Line R. Co., supra (318 U. S. 68, 87 L. Ed. 618, 63 S. Ct. 444, 143 A. L. R. 967); Bailey v. Central Vermont R. Co., 319 U. S. 350, 353, 354, 87 L. Ed. 1444, 1447, 1448, 63 S. Ct. 1062. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Again in Ellis v. Union Pacific Railroad, 329 U. S. 649, at page 653, the Court said:

> "The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted facts, are questions for the jury. Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 88 L. Ed. [fol. 14] 520, 64 S. Ct. 409, 15 N. C. C. A. (N. S.) 647; Lavender v. Kurn, 327 U. S. 645, 90 L. Ed. 916, 66 S. Ct. 740, supra. Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-

minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. Lavender v. Kurn, supra (327 U. S., p. 652, 90 L. Ed. 922, 66 S. Ct. 740). And where, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury. Washington & G. R. Co. v. McDade, 135 U. S. 554, 572, 34 L. Ed. 235, 241, 10 S. Ct. 1044; Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 68, 87 L. Ed. 610, 618, 63 S. Ct. 444, 143 A. L. R. 967.

"We think the evidence raised substantial questions for the jury to determine and that there was a reasonable basis for the verdict which it returned.

"Reversed."

In Lavender v. Kurn, Trustee of San Francisco Railroad Co. etc., 327 U. S. 645, at page 652, the Court said:

"It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was [fol. 15] murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. (Citing cases.) See also Moore, 'Recent Trends in Judicial Interpretation in Railroad Cases under the Federal Employers' Liability Act.' 29 Marquette L. Rev. 73.

"It is no answer to say that the jury's verdict involved speculation and conjuncture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of specu-

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lation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. *And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.*

[fol. 16] "The judgment of the Supreme Court of Missouri is reversed and the case is remanded for whatever further proceedings may be necessary not inconsistent with this opinion."

In Bolin v. Lehigh Valley Railroad Co., 167 Federal 2d 934, the Court said:

"Appellant objects that the verdict is based on speculation and conjecture. On that subject the Supreme Court has recently said in Lavender v. Kurn, 327 U. S. 645, 653, 66 S. Ct. 740, 744, 90 L. Ed. 916: 'It is no answer to say that the jury's verdict involved speculation and conjecture. * * * Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.' In the case at bar there is no complete absence of probative facts. As we have already indicated, the record contains testimony from which the jury could reasonably have drawn the inference of a violation of the Boiler Inspection Act, and that the violation led to the accident. Even if we might have drawn other infer-

ences, we have no power to upset a verdict based on that evidence."

[fol. 17] In Williams v. New York Central Railroad, 84 N. E. 2d 399, 402 Ill. 494, the Supreme Court of Illinois, in quoting from the case of Tennant v. Peoria & Pekin Union Railroad Co., 321 U. S. 29, at page 405 of the Northwestern Reporter, said:

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusions as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. (Citations.) That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

In Stanczak v. Pa. Ry. Co., 171 Fed. 2d 43, at 47, the Court said:

"There being evidence from which the jury may reasonably have inferred that Stanczak came to his death by one of the means suggested above and upon [fol. 18] which to base a finding that such means involved negligence on the part of appellant under the circumstances shown by the evidence, it is not within the function of this court to go back of the jury's verdict to consider other possible means not involving negligence on the part of appellant." (Citing authority.)

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In Boston & M. R. R. Co. v. Cabana, 148 Fed. 2d 150 at 153, the Court said:

> "To recover under the Federal Employers' Liability Act the plaintiff must prove that the defendant was negligent and that such negligence was the proximate cause in whole or in part of the accident." (Citing authority.)

In Witherbee v. Elgin, Joliet & Eastern Ry. Co. (C. C. A. 7th Circuit), 191 Fed. 2d 302 at page 308, the Court said:

> "An appellate court may not reweigh the evidence and set aside the verdict because the judges would draw different inferences and conclusions than the jury drew, or because they think that another result would be more reasonable. Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 35, 64 S. Ct. 409, 88 L. Ed 520. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 744, 90 L. Ed. 916."

Again the Circuit Court of Appeals for the Seventh Circuit in Waddell v. Chicago & E. I. R. Co., 142 Fed. 2d 309 at page 309, said:

> [fol. 19] "Defendant makes a rather convincing argument that plaintiff's injuries were not the result of any negligence on its part. It is an argument, however, which could more appropriately be made to the trier of the facts. Any doubt heretofore existing as to the limited scope of our authority on review has been dispelled by recent decision of the Supreme Court. Bailey v. Central Vermont R. Co., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; Tennant v. Peoria & Pekin Ry. Co., 64 Ct. 409. *No good purpose could be served, therefore, in relating or discussing the testimony farther than to ascertain it plaintiff's charge of negligence is supported by any substantial evidence when considered in the light most favorable to plaintiff and together with all inferences which may be reasonably drawn therefrom.*" (Emphasis ours.)

In Stanford v. Pa. Ry. Co., 171 Fed. 2d 632 at 634, the Court said:

> "Thus there is presented the question of whether there was any evidence to support the jury's finding that defendant negligently moved the engine at a time when Stanford was attempting to put water into the tender. If there was any evidence which, together with all the reasonable inferences that might be drawn therefrom, supports plaintiff's case, the trial judge erred in substituting his conclusion for those of the jury, since the jury is the tribunal to decide that type of issue." (Citing authority.) "Only a complete absence of probative facts to support the conclusion reached would justify a court to substitute its conclusion for [fols. 20-21] those of the jury. Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916. This is so because the choice of conflicting versions of the way the accident happened, the decision as to which witness is telling the truth and the inferences to be drawn from uncontroverted as well as controverted facts are question for the jury. Once there is a reasonable basis for concluding that there was negligence which caused the injury, it is irrelevant that fair minded men might reach a different conclusion. Otherwise it would be an invasion of the jury's function for the trial judge to draw contrary inferences or to conclude that a different conclusion would be more reasonable. Ellis v. Union Pacific R. Co., 329 U. S. 649, 653, 67 S. Ct. 598, 91 L. Ed. 572."

Many other cases are available, but the foregoing should suffice. The above should conclusively prove that the appellate court erred in its judgment in this case, and that leave to appeal should be allowed.

Prayer

For the above and foregoing reasons, your petitioner, Wayne Harsh, respectfully prays that this Honorable Court grant leave to him to appeal to this Honorable Court from said judgment entered in the above-entitled cause in the Appellate Court, Fourth District of the State of Illinois.

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[fol. 22] IN THE SUPREME COURT OF ILLINOIS, March Term, A. D. 1954

WAYNE HARSH, Petitioner,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY, a Corporation, Defendant

Petition for Leave to Appeal from the Appellate Court, Fourt District

There Heard on Appeal from Circuit Court of Madison County

Honorable Quinten Spivey, Trial Judge

PETITION FOR LEAVE TO APPEAL
OPINION OF THE APPELLATE COURT

Bardens, P. J.,

Plaintiff filed his complaint in the Circuit Court of Madison County alleging a violation by defendant of the Federal Boiler Inspection Act and personal injury resulting therefrom. Defendant's motions for a directed verdict at the close of plaintiff's evidence and at the close of all the evidence were overruled and the jury returned a verdict in the sum of $12,000.00 upon which judgment was entered. Defendant's motions for judgment n. o. v. and for a new trial were likewise overruled and this appeal followed.

[fol. 23] Defendant operates an electric interurban line from Alton, Illinois, to St. Louis, Missouri. Trolley poles connect with an overhead power line in the normal fashion and are retracted automatically to a horizontal position on top of the car if the pole should slip off the power line. The mechanism by which the pole is thus retracted is called a "retriever" and its alleged failure to operate properly is the basis of plaintiff's action. The retriever is an intricate device composed of powerful springs that are wound and set as the trolley pole rope is pulled out to put the pole in contact with the power line. Then if contact with the power line is broken and the rope suddenly jerked by the trolley springing free, the retriever is activated and causes the

rope to be automatically and quickly rewound into the retriever, bringing the pole down to the tope of the car. A retriever is located at both ends of the trolley car to control the trolley pole at that end. To "set" a retriever requires a careful pulling of the trolley rope out of the retriever until the retriever springs are fully wound and a catch takes hold keeping the springs tightly wound. Any jerk of the line as the trolley is then allowed to ascend to make contact with the powerline, or a failure of the catch to hold the spring tension, will result in the line being quickly and powerfully rewound.

On April 25, 1950, plaintiff was the conductor on the first car of a three-car train pulling into the St. Louis depot two to four minutes late. As the cars crossed a switch, the rear trolley on plaintiff's car jumped the track and he climbed out to reset it. Plaintiff testified that he pulled out the rope in the usual fashion and set the retriever; then with the tension from the retriever springs off the rope, he permitted it to slide slowly through his hands to bring the pole into contact with the power line; that suddenly the retriever operated, jerking the plaintiff between the two cars, injuring his back.

Plaintiff alleges that the retriever was defective and that the defendant's failure to keep the said retriever in a safe condition for his use constituted a violation of the Federal Boiler Inspection Act (45 USCA, Sec. 23). This paragraph is part of the Safety Appliance and Equipment Act and reads as follows:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said [fol. 24] locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

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This paragraph has been frequently construed and clearly imposes an absolute liability on the railroad for injuries to employees proximately caused by defective equipment. The liability under Paragraph 23 is not based on negligence and the railroad will therefore not be excused by a showing of care on its part or contributory negligence on the employee's part. A continuing, absolute duty to maintain equipment in a safe condition puts the railroad in the position of an insurer for injuries falling in this category. Moore v. Chesapeake & Ohio R. R. Co., 291 U. S. 205; Williams v. N. Y. Central Ry. Co., 402 Ill. 494, 84 N. E. (2d) 399.

The defendant's several motions raise the legal sufficiency of the plaintiff's evidence, standing alone, of proof of violation of Section 23, of proof of defectiveness of the retriever in question proximately causing plaintiff's injuries, and the weight of said evidence when considered in the light of all the evidence. The evidence shows that a retriever in perfect condition retrieves with a jerk when the trolley pole becomes disengaged from the power line; that is its normal function. It is also clear that considerable care is required or the retriever may be caused to retrieve as the rope is played out to raise the pole to the line. Various witnesses, including plaintiff, testified that it happened frequently in the process of resetting trolley poles.

Plaintiff's evidence does not include any affirmative, specific evidence of a defect in the retriever in question. It does, however, negate any fault or mishandling of the retriever by plaintiff and, therefore, argues inferentially that plaintiff's testimony of the happening of the incident evidences a defect in the mechanism. In addition to plaintiff's own testimony, a Mechanical engineer testified on his behalf that in [fol. 25] his opinion a retriever which retrieved under the circumstances described by plaintiff was defective in certain specific details. In testing this evidence under the issues raised by defendant's motion for a directed verdict we are bound to consider it, and reasonable inferences leading therefrom, as true. This does not mean that in any case the existence of necessary evidentiary facts can be argued wholly by evidence of the occurrence of an event, or that a forceful presumption or inference of fact is a sufficient substitute for evidence of said fact. However, in the instant case, the issue of liability turns upon the existence of

a defect in a mechanism to which the parties did not have equal access. Plaintiff's evidence of the incident created an inference of such a defect. In our view, the burden was properly on defendant to refute this inference by producing the allegedly defective retriever in court or presenting specific evidence as to its operating condition at the time in question. This it did not do. In the absence of such specific rebuttal, plaintiff's evidence taken as true has sufficient probative force to require the issues to be submitted to a jury. Robson v. Pennsylvania R. Co., 337 Ill. App. 557, 86 N. E. (2d) 403.

Defendant further contends that the verdict of the jury finding a violation of the Boiler Inspection Act is contrary to the manifest weight of the evidence. In general, it may be said that plaintiff's evidence of injury resulting from the allegedly defective retriever was contradicted in many particulars, but these contradictions went to the point of plaintiff's credibility and were resolved by the jury in his favor. However, with respect to the existence of the alleged defect, certain undisputed facts were established by the evidence. Plaintiff himself testified that before the run back to Alton was started, he saw the motorman set the pole that plaintiff had left in the retrieved position under the hook on top of the car, and that he presumed the retriever was reset at that time. Further, on the cross-examination of the mechanical engineer who gave opinion evidence on plaintiff's behalf as to possible defects in the retriever which would cause it to retrieve unexpectedly, it was stated that these same defects would prevent the retriever from operating normally [fol. 26] at all. Yet the evidence shows that the retriever operated normally before and after the incident complained of. In order for the retriever to have retrieved the trolley pole when it jumped the line going to the depot, it must have been in good working order; again, when the motorman reset the retriever and placed the pole on the hook before the return trip to Alton, the retriever operated normally. These facts to be gathered from plaintiff's evidence, in our view, appear more favorable to the defendant than to the plaintiff. The evidence further showed that what happened to plaintiff on this occasion had happened to him and to others from time to time without the retriever having been defective. The burden rested on plaintiff to show that on

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this occasion a defect existed and that it proximately caused his injury. With respect to the alleged defect, it is clear from all the evidence that this burden of proof was not satisfied. The inference of a defect arising from plaintiff's circumstantial evidence is manifestly outweighed by the showing that the retriever worked normally before and after the incident and by the other evidence in the record. It is, therefore, our conclusion from all the evidence that the jury finding of a violation of the Boiler Inspection Act is clearly against the manifest weight of the evidence. Robertson v. Louisville & N. R. Co., 327 Ill. App. 44, 63 N. E. (2nd) 608.

Since this matter must be remanded to the trial court for a new trial because the jury's finding of a violation of the Boiler Inspection Act is manifestly against the weight of the evidence, we need not discuss in full other grounds of defendant's contention that it is entitled to a new trial. As a guide on the retrial of this cause, however, we might say that defendant's argument that the trial court erred in permitting plaintiff's expert to testify on the ground that his testimony was based on an experiment is without merit. The expert's testimony concerning the operation and mechanism of a retriever based on his disassembling of another retriever was designed to inform the jury of the workings of this intricate mechanism and give foundation to his opinion evidence. On the basis of his knowledge gained from disassembling a retriever, he gave his opinion as to what defect might have caused the retriever in question to operate in the fashion described by plaintiff. The significance of this foundation evidence lay not in the physical facts described, but in the opinions and conclusions based thereon. Therefore, the evidence was not in the [fol. 27] nature of an experiment and the dissimilarity of conditions at the time of injury and at the time of the witness's disassembling of the retriever did not render his testimony incompetent.

Another error urged by defendant was that the trial court erred in denying defendant's motion praying for an order requiring plaintiff to submit himself for physical examination, as provided by Rule 25 of the Federal Rules. In order to sustain such motion, it must necessarily be concluded that a federal rule of practice extends to a case based on a federal statute arising in a State Court since the law

of Illinois denies such right of physical examination. C. R. I. & P. Ry. Co. v. Benson, 352 Ill. 195, 185 N. E. 244. Rule 1 of the Federal Rules of Civil Procedure limits the scope of said rules to "procedure in the district courts of the United States." The granting to State Courts of concurrent jurisdiction in F.E.L.A. cases does not require that a federal rule supplant the procedural law of a state. It must, therefore, be concluded under the rule enunciated by the Illinois Supreme Court that a plaintiff cannot be required to submit to a physical examination in a matter pending in our State Courts even though the matter arises under a federal statute.

[fol. 28] Finally, defendant urges that the giving of an instruction on behalf of defendant and the refusal to give an instruction on defendant's behalf constituted error. Defendant's offered instruction was:

> "The Court instructs the jury that the mere happening of the alleged occurrence raises no presumption of the violation of the section of the statute in question."

This type of instruction has often been criticized as misleading and confusing though it correctly states the law. West Chicago Ry. Co. v. Peters, 196 Ill. 298; Elmore v. Cummings, 321 Ill. App. 234, 52 N. E. (2d) 827. Its fault lies in the fact that a series of similar instructions could isolate every element of a plaintiff's case and conclude that, standing alone, that element could not support a recovery. Each such instruction would be correct; but a clearer and fairer presentation of the law for the jury lies in an affirmative statement of what a plaintiff is required to prove to recover. The trial court correctly refused such instruction. Nor do we find any error in the giving of plaintiff's instruction referring to "the defective condition, as aforesaid," of the retriever without setting forth specifically the alleged defect. The jury heard the instructions as a series and were capable of remembering that the "as aforesaid" referred to a prior allegation of defectiveness and not to an established or recited defect. We have previously stated that plaintiff was required to prove a defect in the retriever.

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We see no necessity that such defect be described specifically in the complaint or an instruction.

For the reasons specified, the cause is reversed and remanded for a new trial.

Reversed and remanded for a new trial.

Scheineman and Culbertson concur.

[fol. 29] SUPPLEMENT TO OPINION ON DENIAL OF PETITION FOR REHEARING

Bardens, J.

On petition for rehearing plaintiff contests, for the first time, the power of a reviewing court to consider the weight of the evidence in F.E.L.A. cases and to reverse and remand a judgment as against the manifest weight of the evidence. It is contended that once such court determines that there is sufficient evidence in the record to support submitting the issues to a jury, it has exhausted its function with respect to weighing the judgment against the evidence. Numerous cases are cited and relied upon, principally, Lavender v. Kurn, 327 U. S. 645, 90 L. Ed. 916; Ellis v. Union Pacific Railroad Co., 329 U. S., 649, 91 L. Ed. 572; Tennant v. Peoria & Pekin Union Railway Co., 321 U. S. 29, 88 L. Ed. 520; Williams v. New York Central Railroad, 402 Ill. 494, 84 NE 2d 399; Nickell v. B. & O. R. Co., 347 Ill. App. 202, 106 NE 2d 738. All of these cases deal with the questions of directed verdicts or judgments notwithstanding the verdicts and not with the reversal and remandment on the ground of a verdict against the manifest weight of evidence.

Standing alone, language from these opinions appears to lend force to plaintiff's argument. However, considering each case in its entirety, it becomes apparent that they do not support plaintiff's position. In virtually all of them the reviewing court does in fact carefully detail and consider the evidence. Where it was felt the trial court or a reviewing court weighed conflicting evidence, or considered inferences as true which a jury had already rejected, the lower court's action in taking the case from the jury was disapproved.

The opinion of the court in the case at bar notes the fact

that the evidence of an incident occurring and injury therefrom was highly contradicted but that these issues relate to the credibility of witnesses and were decided by the jury in plaintiff's favor. Such finding, therefore, was not disturbed. On the issue of the existence of a defective appliance, this court did not weigh conflicting evidence, consider the credibility of the various witnesses, nor follow what it considered a more reasonable inference. It considered only undisputed facts and circumstances. These facts were not susceptible of varying inferences but constituted a manifest weight of evidence in opposition to the claim of a defective or unsafe retriever.

[fols. 30-38] Plaintiff has cited no authority, and we find none, which removes the reviewing court's historical power to reverse and remand a case for new trial when it believes the verdict to be against the manifest weight of the evidence. The cases cited do illustrate the reluctance of the reviewing courts to disturb findings on issues that are based on credibility of witnesses. We find in these authorities, however, no such restrictive rule of law as urged by plaintiff.

Petition for rehearing denied.

Scheineman, J.J., and Culbertson, J., concur.

[fol. 39] In the Supreme Court of Illinois

[Title omitted]

Abstract of Record from Circuit Court of Madison County

Complaint—Filed January 15, 1951

Complaint

Count 1

1. That the defendant, Illinois Terminal Railroad Company, on the 25th day of April, 1950, was in possession and control of and was operating a general railroad system consisting of both steam, diesel, and interurban electric [fol. 40] trains in the State of Illinois and particularly in Madison County, Illinois.

2. That plaintiff was then and there an employee of defendant as a conductor on one of defendant's electric trains.

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3. That on said day, plaintiff was engaged as such conductor on said train while same was being brought into the depot of defendant in St. Louis, Missouri, which train was then and there being used by the defendant in carrying passengers in interstate commerce between the states.

4. That in the movement of said train the defendant was engaged in interstate commerce and in assisting and working on same plaintiff was also engaged in interstate commerce.

5. That there was then and there in full force and effect a certain United States Statute, being U. S. C. A., Title 45, Sec. 23, which is as follows:

> 23. Use of unsafe locomotives and appurtenances unlawful; inspection and tests.—It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with [fol. 41] the provisions of Sections 28, 29, 30 and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. (Feb. 17, 1911, c. 103, paragraph 2, 36 Stat. 913; Mar. 4, 1915, c. 169, paragraph 1, 38 Stat. 1192; June 7, 1924, c. 355, paragraph 2, 43 Stat. 659.)

6. That defendant's electric powered cars were equipped with retrievers which were used for recoiling the trolley rope on said cars in the event that said trolley jumped from the wire during the operation of same.

7. That in the event said trolley should jump the line as aforesaid, said retriever would recoil said rope and draw the trolley of said car down and rewind part of said rope into said retriever, and it was then necessary in order to reset said trolley rope that the part of said rope wound into said retriever be pulled out manually from said retriever by an employee of defendant.

8. That it was then and there the duty of defendant by reason of the aforementioned statute to maintain and keep said retriever in a proper and safe condition and unlawful for it to do otherwise, as provided by said Section 23 of the United States Code Annotated, as aforesaid.

9. That notwithstanding this duty of defendant as aforesaid it wholly failed to do same and on the date in question it permitted said retriever on its electrically powered car in the train in question upon which plaintiff was then and there employed, to be in an unsafe and improper condition to operate in the service for which it was put and in such [fol. 42] a condition as to imperil life and limb.

10. That while proceeding into defendant's depot in St. Louis, Missouri, as aforesaid, the trolley on one of said electric powered cars jumped from the line and plaintiff, in the courses of his employment, and while attempting to place said trolley back on the wire was injured, in that, he was pulling the rope from the retriever on said car when it recoiled jerking plaintiff violently to and against said car; that said retriever should not have recoiled in this manner and would not have done so had it been operating properly; that when so properly operating the retriever recoils only when the trolley has jumped the line and should not do so while the rope is being pulled from it as plaintiff was doing.

11. That as a result of the foregoing plaintiff sustained serious and permanent injury to his back, and to the muscles, bones, ligaments and tissues therein. That he also sustained divers and numerous other injuries and that all of said injuries have and will in the future cause him great pain and suffering, that he has lost and will continue to lose large sums of money he otherwise would have earned had he not been so injured. That plaintiff has also been obliged and will in the future continue to incur large expense in physician and hospital and medical expense in attempting to be cured of said injuries. All to the damage of plaintiff in the sum of Thirty Thousand Dollars ($30,000.00).

Wherefore plaintiff prays judgment against defendant in the sum of Thirty Thousand Dollars ($30,000.00) and costs [fol. 43] of suit.

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(Count II of the complaint was dismissed by plaintiff on September 19, 1951, before the selection of the jury and is not abstracted because it is not in issue in this cause.)

Order extending time to plead by defendant until February 29, 1951.

Answer filed.

ANSWER

1. Admits the allegations of Paragraph 1 thereof.
2. Admits the allegations of Paragraph 2 thereof.
3. Admits the allegations of Paragraph 3 thereof.
4. Admits the allegations of Paragraph 4 thereof.
5. Admits the existence of the Statute alleged, but denies any inference of said Complaint that Defendant has not at all times fully complied therewith.
6. Admits the allegations of Paragraph 6 thereof.
7. Admits the allegations of Paragraph 7 thereof.
8. Admits the allegations of Paragraph 8 thereof, but denies any inference that the Defendant, at any time, did not maintain said retriever in a proper and safe condition as provided in said Section 23 of the United States Code.
9. Denies each and every allegation of Paragraph 9 thereof.
10. Denies each and every allegation of Paragraph 10 thereof.
11. Denies each and every allegation of Paragraph 11 thereof.

[fol. 44] Wherefore, Defendant prays judgment against Plaintiff for costs of suit.

NOTICE OF AND MOTION FOR PHYSICAL EXAMINATION OF PLAINTIFF—September 13, 1951

You are hereby notified that the Defendant will appear before the Circuit Court of Madison County, Illinois, at the Court House in Edwardsville, Illinois, at the hour of 9:30 A. M. Monday, September 17, 1951 for the purpose of calling up Motion attached to this Notice and for the purpose of

securing an Order conforming with said Motion, at which time you may appear if you so desire.

Dated this 13th day of September, A.D. 1951.

1. That Plaintiff has filed his suit for personal injuries claiming damages to the extent of Thirty Thousand Dollars ($30,000) and has brought such action under the Federal Employees' Liability Act and by reason thereof subject to Federal Rules of Civil Procedure.

2. That under said rules where the physical condition of a party is in controversy the Court may order such party to submit to a physical examination.

3. That Defendant under said Rule moves that Plaintiff, Wayne Harsh, be required to submit himself to a physical [fol. 45] examination to be made by the following qualified physician namely:

Dr. E. C. Holscher, Room 517, 3720 Washington Avenue, St. Louis, Missouri.

and that the physical examination should include the back, and the muscles, bones, ligaments and tissues therein and a general physical examination pertaining to the alleged injuries contained in Paragraph II of Count I and Paragraph 10 of Count II.

4. That Defendant will agree to pay all transportation charges to the place of examination and loss of time sustained by said Plaintiff.

5. That said examination to be made by said doctor at said address on Monday, September 17, 1951, at the hour of 3:00 P.M. Central Daylight Saving Time.

Wherefore, Defendant moves that the Court enter an Order requiring the Plaintiff, Wayne Harsh, to submit to a physical examination as set forth in the above Motion and in accordance with said Rule.

Order Denying Motion, as Amended After Leave, for Physical Examination of Plaintiff.

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AMENDED MOTION FOR PHYSICAL EXAMINATION OF PLAINTIFF

1. That Plaintiff has filed his suit for personal injuries claiming damages to the extent of Thirty Thousand Dollars ($30,000) and has brought such action under the Federal [fol. 46] Employees' Liability Act and by reason thereof subject to Federal Rules of Civil Procedure.

2. That under said rules where the physical condition of a party is in controversy the Court may order such party to submit to a physical examination.

3. That said plaintiff testified under oath at deposition given on the 8th day of March, 1951, that he had received serious and permanent injuries as a result of the alleged negligence of the defendant; that the only way the true physical condition of said plaintiff can be ascertained is by a medical and physical examination, that said defendant is unable to properly prepare its defense to that portion of plaintiff's demand which relates to the extent of his alleged injuries without such discovery; that defendant should as a matter of right, both under the appropriate Federal Rules of Practice and under the Statutes and Common Law of the State of Illinois be given the right to secure a physical examination of the plaintiff by proper order of this court.

4. That defendant under said Federal Rules of Civil Procedure and by virtue of the Statutory and Common Law of the State of Illinois, moves that plaintiff Wayne Harsh be required to submit himself to a physical examination to be made by the following qualified physician namely:

Dr. E. C. Holscher, Room 517, 3720 Washington Avenue, St. Louis, Missouri.

[fols. 47-50] and that the physical examination should include the back, and the muscles, bones, ligaments and tissues therein and a general physical examination pertaining to the alleged injuries contained in Paragraph 11 of Count I and Paragraph 10 of Count II. That this Motion is not made for the purpose of delay but for the purpose of obtaining justice and a fair trial for said defendant.

5. That defendant will agree to pay all transportation charges to *to* the place of examination and loss of time sustained by said plaintiff.

6. That said examination to be made by said doctor at

said address on Monday, September 17, 1951, at the hour of 3:00 P. M. Central Daylight Saving Time.

Wherefore, said defendant moves this court to enter an order requiring said plaintiff to submit himself, before trial, to a medical and physical examination of his said alleged physical injuries, subject to such terms and conditions as this court shall impose in its said order.

[fol. 51] MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT AND IN THE ALTERNATIVE FOR A NEW TRIAL—Filed June 25, 1952

1. That Plaintiff has failed to prove each and every material allegation of his Complaint.

2. That Plaintiff has failed to prove that the particular [fol. 52] retriever complained thereof in Count I of said Complaint was defective or that if failed to operate in the manner for which it was constructed.

3. That Plaintiff has failed to prove that the Defendant has violated any of the provisions of Section 23 of Title 45, U.S.C.A., as alleged in Paragraph 5 of Count I of said Complaint.

4. That the Plaintiff failed to prove any defect in the retriever on Defendant's equipment which would constitute a violation of U. S. Code, Title 45, Section 23.

5. That there was no evidence to prove that the alleged injury was the direct and proximate result of any violation of U. S. Code, Title 45, Section 23.

Wherefore, Defendant prays that judgment *be* entered in its favor and against the Plaintiff in bar of further action and for costs of suit.

Or if this Honorable Court does not see fit to enter judgment in favor of the Defendant, notwithstanding the verdict, then said Defendant, in the alternative, moves this Court to set aside the verdict of said jury and to grant a new trial and for cause thereof, shows to the Court the following:

1. The verdict is against the law and the evidence in this case.

2. The verdict is against the manifest weight of the evidence.

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3. The verdict is against the law applicable to such case. [fol. 53] 4. There is not sufficient, competent or proper evidence to support such verdict.

5. The damages fixed by such verdict are excessive and are not reasonably supported by competent evidence.

6. The verdict is the result of sympathy for the Plaintiff.

7. The Court erred in admitting improper and incompetent evidence over objection by the Defendant.

8. That the Plaintiff failed to prove any defect in the retriever on Defendant's equipment which would constitute a violation of U. S. Code, Title 45, Section 23.

9. That there was no competent evidence that the retriever on the car in question was not in proper condition and safe to operate in the service to which the same had been put so that same could be employed in the active service of Defendant without unnecessary peril to life or limb.

10. That there is no evidence to prove a violation of Section 23, Title 45 of the U. S. Code or any part thereof.

11. That there was no evidence to prove that the alleged injury was the direct and proximate result of any violation of Section 23, Title 45 of the U. S. Code. That the Court allowed the introduction of incompetent evidence which determined the ultimate issue to be decided and thereby invaded the province of the jury.

[fol. 54] 12. That the opinion of the alleged expert was based upon an experiment and was incompetent as evidence because the essential conditions of the experiment were not shown to be the same as those existing at the time of the occurrence in question.

13. That the opinion of the alleged expert was pure speculation and was not given in response to any hypothetical question.

14. The Court erred in giving improper instructions offered on behalf of the Plaintiff.

15. The Court erred in refusing to give certain instructions offered by the Defendant.

16. That this Court is without jurisdiction to enter judgment on the verdict of the jury, since the Trial Judge who heard the evidence in this case reserved his ruling upon the Defendant's Motion for Directed Verdict at the close of all the evidence in the case.

17. The Court erred in refusing Defendant's Motion, as amended, for physical examination of Plaintiff by physician as provided by Federal Law.

Proceedings had and entered of record as follows:

July 16, 1952—On this day the Court hears arguments of counsel on the motion of the defendant for judgment notwithstanding the verdict and also motion for a new trial filed by the defendant herein and the court not being fully advised takes the said motion under advisement.

[fol. 55] Docket Entry

September 26, 1952—On this day the Court now being fully advised of the premises denied the defendant's motion for judgment notwithstanding the verdict. And the Court also being fully advised in the premises defendant's motion in the alternative for a new trial and heretofore taken under advisement is denied.

[fol. 56] Report of Proceedings at Trial—Filed December 22, 1952

Plaintiff's Evidence

Wayne Davis Harsh

Direct Examination.

My residence is Lindell Avenue, Nameoki, and I am a conductor and bus operator for the Illinois Terminal Railroad Company. I was so employed by said company on April 25, 1950, as a conductor and started to work that morning at Alton at 6:50 A.M. On the particular trip we were operating Train No. 9, a three-car train, and on this train was Charley Elder, motorman, myself as conductor, and J. L. Green and Mr. Campbell as trailer conductors. I was on Car No. 123, the first car of the three-car train. We used the rear trolley poles on the front two cars. They slant back, with the car going one direction and the poles slanting the other direction and that is the normal operation of the car. All three cars were loaded with passengers. We went into the St. Louis Junction from Alton;

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we had occasion to go into the tunnel and the open area into the station there. Train No. 9 is a limited train out of Alton at 7:00 o'clock and we were in St. Louis at 7:48, I believe at that time track No. 1. Train No. 9, consisting of three large cars, always went in on track 3 and on the opposite side of the platform; in other words, there are platforms on both sides of the main platform in the middle and tracks on both sides. The normal operation is for the head conductor to get out, line the switch for track 3, [fol. 57] proceed until your complete train is through the crossover—what we call the crossover or switch, and the rear conductor drops off and lines the switch to No. 1 track. He gets back on his train and we pull on into the station and unload. On that particular morning we were 2 to 4 minutes late—it was between 7:50 and 7:52 a.m. when he got all the way into the station. We pulled up to track No. 3, or the switch, and I got out and lined the switch and gave my motorman the sign to proceed and he came on and as he passed me I stepped over and we started to cross onto track 3, and the pole on the second car didn't take the crossover and Mr. Green got out and pulled the pole down and put it underneath the safety hook. This is a hook for the pole to stay in and when he put the hook in we proceeded and the the pole on my car jumped the track, that is, jumped the rail and I got out and went back to reset the pole. When I went back to reset the pole I was between the first and second car. Between the cars there is a draw-back to pull the two cars together. The retriever is not directly in the center; it is to the right of the middle of the car, oh, from 8 to 10 inches from the center. The retriever is about 5½ foot from the level of the ground. On this particular day in question I had occasion to attempt to reset the trolley on the pole. I have had experience with retrievers and have been employed by the Company since 1944 and during the several years that intervened since my employment I have had occasion to operate retrievers on numerous occasions and that was my duty every time I worked the train service, and I was familiar with the normal operation of retrievers. On this particular day I dropped off the car and I saw we only had the one pole up after [fol. 58] Mr. Green pulled it down and put it under the

hook, then the entire train was controlled by this one pole and we were going to proceed into the station with it. The pole ran off and I went back to set the pole and I pulled the retriever out. At this point, in order to pull the retriever out it would take plenty of force, they are something to pull out. It takes considerable amount of strength, sometimes it is impossible. In order to pull this retriever out I took hold of the rope, naturally to pull it down against the car and I started pulling as much as was necessary to rewind these springs to reset the retriever. When it is set it locks itself on the leash, you release the rope, and release your pressure until you know when it is set. The retriever will click and stop and it will wind itself up very slowly and easily. I let the rope back into the retriever because the pole was up and when I got the pole down to where I could set it on the wire, and for some reason it caught and rewound and when it did it yanked me in between the cars. Then it was just like someone hit me and I had a terrible pain all the way down my head and back and sickening. I tried to pull it out and I couldn't. I was sick and felt like vomiting, and I reached over the coupler with my other hand and set the other pole up and proceeded into the station. You have to set these retrievers very slowly because after you have used them you know what they will do. You know they will jerk your head off if you don't watch them. You have to work with them cautiously and slowly and carefully, but I was working slowly because I knew if I worked fast or any other way that it would retrieve. The rope was not at any time, while I was resetting it, played out in a sudden fashion. I did not reset it under the hook, [fol. 59] but I could not pull it out. It was pulled down to the car level, and in order to hook it in the hook you would have to pull it out and I couldn't pull it out. So it remained down on the top of the car and then I set the other trolley which was on the front. It was the front pole on the second car. When I reset the front pole on car No. 2, we backed in against the pole. That would be going in the wrong direction and you should not do it only in case of emergency. I did not observe what Mr. Green and Mr. Campbell were doing, they usually stand on the step of the car. I know a fellow by the name of Paul Gages who rides on my car and he was on the particular car at said

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time. When I came back to get on the car, I pulled myself back on the step, there is a middle partition there and I took hold of it and pulled myself and went up, and when I turned around to give Mr. Elder the proceed sign, and observed Mr. Gages. The pain gradually started leaving, it was not nearly as severe as it was. When I reached the Station I did not discharge the passengers. It was customary for me to assist the passengers off the car. After that the train was dead-headed back into Granite City, but when the train stopped in the station and discharged passengers I saw Mr. Elder. He had just come out of the booth reporting to the dispatcher and he was heading what we term the lead car going out, it was the back car going in. Mr. Campbell's car, and as he came by I apprised Mr. Campbell and Mr. Elder of the injuries. When I got back into Granite City I went into the yard and terminated my employment for that period. I was due to work again later that day, I was off until about 2:10 p. m. that afternoon. I [fol. 60] worked from that time until about 6:15 p. m. When I got off the car I walked over to my car and then went to my home and my wife was there. I didn't eat any dinner or breakfast. When I got home I was too sick to eat any breakfast that my wife had already started to prepare and I went into my room, took my uniform off and laid down across the bed for a few minutes. After that I got up, went out to my car and drove to Wood River to see a Mr. Clyde Martin. Mr. Martin and I had engaged a roofing job to start that morning at 8:00 o'clock at Mr. DePaula's house. I started to Wood River, I was in considerable pain around my back and when I got to Wood River I parked my car in front of Mr. Phillips' house. Mr. Phillips is a co-worker with me, he is a motorman and a bus driver and his first name is Raymond. He works for the Illinois Terminal Railroad Company and still works for them. I went into Mr. Phillips' house and while I was there I called my wife at home. The purpose of calling my wife was to have her report out for me and that was about 9:30 and the reason I wanted to report off was because I was too sick to work. I stayed at Mr. Phillips' house for quite some time and I later saw him and Mr. Martin and he came there between 9:30 and 11:00. After Mr. Martin got there he consulted me and told me about the by-laws in the Alton

District and that was in regard to getting some waiver for the job. Mr. Martin went back into Mr. Phillips' house and called for the local to send a man. After that we went uptown about a quarter of twelve to get something to eat and I rode up there. I rode with Mr. Phillips in Mr. Martin's car and he parked about a block from the restaurant and they started walking off and they went out and left me and I hollered. I couldn't keep up with them because my [fol. 61] back was hurting too bad and my leg so that I couldn't hardly walk. The three of us went to the restaurant. I drank a cup of coffee and tried to eat a piece of pie, but I couldn't eat it. We went back to the car and went back to Del'aula's home and when we got there a Mr. Wydick had arrived there and was standing in front of the house with his tools. This was about 12:35. At that time that was the first time I went over to do work on the house. Before that time I hadn't done any work on the house. Mr. Martin and Mr. Wydick started to do some work on the roof top, but I didn't have anything to do with the roof. At that particular time my back was still hurting very much. At that time there was an incident about assisting with a ladder. Mr. Martin had one ladder up against the house, a section ladder, to take and make two ladders out of, and Mr. Wydick put the other ladder up, the rider jack on there and he was attempting to put a scaffold board upon the ladder and he had it practically up there, and I reached over and was going to move the ladder, try to pull it to me about six inches or so to make the ladder even, and when I did the jack and scaffold board from the ladder, the board, jack and everything fell, but it did not fall on me, and I was not injured as a result of that and did not have any pain or anything from that, and I did not fall, I just turned around against the house, the opposite house there. At that time I did not lift anything. After that I didn't continue to stay there, but I started for home and I presume it was about 1:00 and Mr. Martin had things lined up and I went over to Mr. Phillips' house. I walked with him a little while and he had telephoned and I didn't stay long. I went out in my [fol. 62] car and started home. I went home and I arrived about 2:00 o'clock, and when I arrived there my back was hurting. It seemed to hurt more and more all the time. That afternoon I went down to see Mr. Quigley, who is a dis-

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patcher for us. I told him about this injury, I told him I had been hurt that morning and had to go to a doctor and I don't remember going into detail with it. I told him about getting hurt that morning. I told him the retriever had caught me and he gave me a slip for Missouri Pacific admitting me to a doctor and the slip did not designate any particular doctor. I went to Dr. Grzesk in Granite City, but I don't think he was a company doctor at that time. On a previous occasion on behalf of the Illinois Terminal I took a lady to Dr. Grzesk for medical attention. She got hurt on the interurban, a boy threw a rock through the window and it hit her, and I took her to Dr. Grzesk for treatment. That afternoon I went to Dr. Grzesk, who was a former associate of Dr. Darner. Dr. Darner was a company doctor. At that time Dr. Grzesk examined me, I discussed with him what the cause of my accident was. Dr. Grzesk put me on the table and examined my back, he had me under heat treatment for quite some time and I was in considerable pain and he also gave me a shot. He gave me a hypodermic. He didn't do anything else for me after he gave me the hypodermic, but I went home and went to bed. I didn't go back to work the following day, I returned to work the following Sunday. During the time I had left work and didn't return, I was in considerable pain all the time until they taped me up. The pain that I was speaking of was in the lower part of my back, down through the hip down the side of the leg to the knee and from the knee it [fol. 63] goes down the back of the leg down into the heel and the foot. The pain feels like needles in there all the time like your arm has been asleep, poor circulation, and it throbs and all that pain into my prostate and I was sick to my stomach all the time, I couldn't eat or keep anything down. The pain continued for a long time. I went down to the Illinois Terminal to make a report when I was able and I believe it was on Thursday, the 28th. About Plaintiff's Exhibit 1, that is my signature, Wayne D. Harsh. It was an accident report that I sent the Company.

(Plaintiff's Exhibit 1, the Accident Report, offered and received in evidence, and appears on pages 91-93 of the Record.)

I returned on the 28th, when I made this report. I made out two reports. I am not certain who I talked to at the

time, but if I talked to anybody it was Mr. Quigley. I had some further discussion with other employees of the company with reference to treatment for my injuries, a Mr. Dowd, who is head of the Claim Department, and he referred me to Dr. Royce, who is a physician in Granite City and a company physician, and I went to him. All that Dr. Royce did for me was to tape me up and I didn't see him any more, he didn't touch me, all he did was look at me. He had the nurse tape me up, high and real low, and he told me I could go back to work. That was the 28th, on a Friday. I sought some other medical attention from another company doctor; I was supposed to go back to Dr. Royce the following Monday morning, and I informed my foreman, Mr. Hurdle, that I would have to be off, and then I talked to Dr. Royce and told him that in order for me to [fol 64] get to see him in the morning that I would have to miss work and he told me not to miss work, that the company would relieve me to get off. I didn't go to see another doctor, I kept asking Mr. Hurdle to let me off and the said he couldn't, he said he didn't have anybody to relieve me, that he would make arrangements for Dr. Royce to see me after work, which he never did do. On the 18th I was too sick and I had to go to the Doctor, and I went to a Dr. Hand, a physician in Granite City. He was out of town the 18th, but I saw him on the 19th, and that was in May. Dr. Hand ordered me into the hospital the following morning, the Missouri Pacific Hospital, but I didn't go over there that morning, they wouldn't let me in. That is Mr. Hurdle. I didn't get into the hospital until 3 that afternoon and I was submitted to bed at 3:50 p.m. that afternoon. That was the hospital in St. Louis and I was admitted there as a service patient. I was signed in by a Mr. McOwen, General Superintendent of our division, and my admission to the hospital was based on a service injury, it was marked on my card service injury. I stayed there in the hospital until the 30th. But I didn't get any certain treatment. I was examined several times by the Missouri Pacific Association doctors and talked frequently and freely with them. I had been ordered to have what they call "whirl pool baths," but they never did give them to me. The only thing that was done for me there was to put me on a hard bed with boards underneath the mattress and I had to lay in bed all the

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time, and all they would give me were shots or hypo pain pills. I stayed there until the 20th, when I was discharged, when they gave me a canvas belt to wear. I wore that on my back. I have continued to wear that belt and I have [fol. 65] been wearing it up until the present time. At times my pain was alleviated, sometimes no. Sometimes the pain was very severe and I was sick to my stomach and couldn't walk, and other days it would be in a way I would feel pretty good. I would be affected with pain if I would do anything, try to move things, and they warned me not to. I couldn't pick up my own little baby and play with him and I still have that condition up to the present time. From May 20th to 30th of May I was not paid any salary and did not receive any pay for that period. I was working seven days a week and earning $1.36 an hour and that was about $12.06 a day was the least we could make. But during the period from the 20th to the 30th I was off 10 days and never received any pay. From the date of the 25th till the time I went back to work I was off work and never received any pay, which was five or six days. After going to the hospital I continued to receive treatments from Dr. Grzesk and saw him at various intervals up to the present time, but he did not prescribe any particular treatment for me. He had given me medicine which I have taken all the time for the purpose of my nervousness and pain and I occasionally take those. I am still treating with Dr. Grzesk. I've been to see him periodically, oh, it runs from once a week to once every two weeks. In April of this year he ordered me to the hospital in Granite City for the purpose of taking X-rays and I was in the hospital all day. I lost six or seven days over that and I was not paid for it. My rate of pay is more now. It is $1.55½ on the buses now. I lost 8 hours and 20 minutes on the day and I would have been paid for the 20 minutes. In May, 1950, I lost work all the way through, there have been periodical spells I have not been able to [fol. 66] work. During November and December and October there were 12 days altogether. Our rate at that time was $1.55½ an hour. You worked 8 hours a day and you got overtime for all over 8 hours on the buses. Preceding the present time, during the spring and summer, I lost time, I couldn't give you the exact days, I could give you the days per month. It was 4 days in May and the last two months

I lost a day and a half. All the time that I was off was because I was unable to work. I worked seven days a week and when I wasn't working it was because I wasn't able to do it. I have had occasion to disassemble one of the retrievers and am familiar with the retrievers that are down there and I was familiar with the retriever on the particular car. I have had a chance to analyze a retriever of the same type that was on the car on this particular day. I took a retriever there from the company which is the same type used on the car. It was sitting on the o.k. bench, that is Bud Vassier's bench in the garage, or what we term the car barns. I took the retriever to the office of Mr. Chapman, my attorney. In the presence of my attorney and an engineer and a mechanic I examined the retriever in a garage in Granite City. It was the Plymouth and Dodge Garage in Granite City, and besides myself there was a Mr. Picker, who is the foreman, and a mechanic. The engineer's name is Kline; he is sitting back there in the court room in the second seat, but I can't remember his name. I was present there at the time that this retriever was taken apart and tested.

Q. Were you present there while it was being tested by this engineer?

Mr. Schuman: Just a minute—certainly that is objected to—it is not the retriever on this car.

[fol. 67] Mr. Chapman: We have to show it in order to make this proper.

Mr. Schuman: We object.

The Court: The retriever that the witness has been talking about, is that the retriever taken from this car?

Mr. Schuman: No, sir:

The Court: Then the objection will be sustained.

Mr. Chapman: This was the same type of retriever—we are going to show the mechanism of that retriever which was the same type.

The Court: The purpose of showing how it functioned?

Mr. Chapman: Yes, sir.

The Court: He may testify to that without this examination.

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Mr. Chapman: I have to identify it as being the same type of retriever as being on this car.

The Court: He can testify how it functioned, but whether or not this retriever was out of repair wouldn't be material here.

Mr. Chapman: No—it is a matter of showing how it functioned.

Mr Burroughs: Another objection he should identify what type.

The Court: He testified to that.

Mr. Burroughs: He just has testified generally.

Mr. Chapman: You can cross-examine.

Mr. Burroughs: This is the first information we knew this had been taken from the shop.

The Court: You may cross-examine.

Mr. Chapman:

Q. Were you present at the time that retriever you testified about was disassembled?

A. Yes, sir.

[fol. 68] Q. And tested?

A. Yes, sir.

Q. You have already stated that you are familiar with the normal operation of the retriever?

A. Yes, sir.

Q. And when a retriever, Mr. Harsh, is played out in the manner you say you were setting at the time of this incident when you were injured, is the retriever operating normally or not?

Mr. Schuman: That is objected to as leading and suggestive.

The Court: I ruled this objection is sustained. I think if you want to show how they function, ask him how it functioned.

Mr. Burroughs: As an expert.

The Court: There was some testimony about this, its general operation—you have an expert here, an engineer who is familiar with retrievers, he may testify.

I have never had any previous trouble with my back whatsoever. About 11 years ago I fell across the hub keel

of a boat, I hurt my back, but it did not incapacitate me, I did not make a claim for it, and it cleared up in about 5 days. I had another incident when I was working for the company. I assisted a lady with some packages off the bus and a little boy had dropped his marble pack and I stepped on a marble and my foot went out from under me, and I went to a doctor and he used heat and salve and it was all over. That was when I was in the employ of the company. I don't think I lost any time. I might have lost a couple of days, but that was quite some time ago because there was no claim that arose out of it. I have not had any other injury to [fol. 69] my back since that incident that I remember. Before this injury I never had any trouble. I've always been able to work hard and lift a lot of weight. I was pretty proud of the fact that I was pretty physically fit.

Cross-examination.

Prior to the time that I worked for the Illinois Terminal Railroad Company, I worked on construction doing high work. I mean by that that I worked on buildings. I was a rigger or chipper. I worked out of Local 363, East St. Louis, as a boilermaker. I don't know just how long I followed that work. I also followed a riveter and was general foreman on construction work. Immediately preceding my employment with the Illinois Terminal Railroad Company, I did construction work and I worked at the Navy Yards at Charleston, South Carolina. While working there in South Carolina I got hurt on a boat about eleven years ago. It was during the war, about 1941, and I was there about 1943. I fell across the keel of a boat shortly after I went down there. I had been working at the ship yards in March, 1943 or 1944, and I worked construction work 8 or 9 months before I considered a job at the Illinois Terminal. Bob Meyers asked me to go to work. I was making $150.00 to $225.00 a week in construction work and it was seasonal work. I never worked for the Illinois Terminal before. I never had any training for it. I was broke in on the way around as a motorman, conductor and bus operator and I became familiar with the rules and regulations of the Company and had a general view of them. The only rule I was familiar with was the report we made on people who got

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hurt, and I was not familiar with any rules pertaining to [fol. 70] myself or any injuries complained of by myself. When I was injured before on the occasion that I mentioned, I don't know whether I made a report or not. I fell on some marbles, I was given treatment by a company doctor, by an elderly gentleman over in Granite City. I spoke of the Missouri Pacific Hospital Association, I paid for that myself and I don't know whether the company paid part of that or not, but my part was deducted from my wages. The only expense over at the Missouri Pacific Hospital was $4.00 a month that was out of my salary. I went to the hospital as a service employee because I was sent there by a company doctor. I was not charged out of my insurance, it was charged out of the company, charged as a patient. I went there first in 1950, about a month after the accident, and had X-rays there, and I was X-rayed for my testicle, bladder and urine, knees, leg and feet, and I was given medicine. They didn't give me any kind of treatment for my back and I was not operated on. After I was in Missouri Pacific Hospital in May of 1950, I went back there several times, I don't remember what particular times. I went back because of my back. I went back quite a few times, but I don't know what days I went. I figured it up at one time and there was 34 doctors that examined me and couldn't find anything wrong with any part of my body or back. Dr. Lembeck examined me and a Dr. Holscher. I don't remember Dr. Mueller about X-rays. I remember Winkler and Burrow. I don't remember the last time I went back, all they would give me would be a sack of pills about that high, big round red pills, horse pills—and nerve pills and that is all. I took these pills but they didn't do me any good and I told them. I went back [fol. 71] to Dr. Grzesk in April, 1950, he was my family doctor and had been that before. I didn't go to him as a family doctor, I didn't go for him myself before, I went for my wife. I considered him my family doctor. This slip I got from Mr. Quigley permitted me to go to any doctor as far as I know and I could go to any doctor of my choosing. I paid for that service. After my injury I went back to the Missouri Pacific Hospital and had some teeth extracted. I was off a week or 7 or 9 days, I think. I am not

including this time as part of the lost time I testified to. I think it was in March, but I am not sure. I was not there recently. I was there in August of this year at the Missouri Pacific Hospital. I had a wrist injury in August of this year and I was at the Missouri Pacific Hospital in August of this year. I was there with my teeth in February 1951. August of this year, when I went in with my teeth, I complained about my back, but I don't know the doctor's name who I talked to. I was not given any treatment for my back at that time. At the time of my wrist injury in August, I was X-rayed at that time and I stayed 1 day. I lost 6 days and they won't pay me for it, 7 now, and I have made a claim for it. I was over there for my back injury in May of 1950 and I went back there for treatment of all kind, I mean one doctor would send me to another one, and another one, all the way down the line, I have been through the whole place. Outside of my back in May, 1950, I stayed there 10 days and they discharged me. They said I could get the same treatment at home and they discharged me. I didn't go back to work after I came back from the hospital. I went back to work on June 24, June of 1950, and I went on a bus and I had operated a bus before. Since I came back to [fol. 72] work, I had an increase in wages over what I made before. Since I went back to work, I have not operated the bus continuously. I had enough seniority so that I worked only an hour in the morning and an hour in the evening, actually about an hour and 40 minutes on duty, and I got a full pay for it and I had enough seniority to hold it. Outside of the times that I have testified, I have worked. I have been off periodically ever since I got hurt. I have no record actually of my time, because the record I had was destroyed by one of my children but I have gone out in the morning and worked a couple or 2 or 3 hours and would have to be relieved because I couldn't stand it because of the sickness and hurting and I would get sick to my stomach. Dr. Grzesk told me that the only thing I could do in time was to be operated on. I have never been operated on and don't want to be and everybody advises against it because there are too many people walking the streets or not living today who have gone. I work as much as I can work and make myself work. I have been operating this bus, and

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the last two months I lost a day and a half apiece. I work periodically. I operate the bus, sit down and operate it, it only pains me at times, it doesn't pain me when I'm sitting if I'm sitting pretty quiet. Sometimes in normal operation of my work it pains me, it's all according to how I feel. It is paining me now, it is a sick pain. I worked for the Company since August 31, 1944. I have worked on the particular type of streetcar ever since I went to work, that would be from 1944 to 1950, and I became familiar with the type of retriever in that time. In the operation of the streetcar on numerous occasions I operated the retriever and oper- [fol. 73] ated the particular retriever on this streetcar on other occasions. I have had this situation happen to me on other occasions, on several occasions. I wouldn't give you a definite number of times, that is silly, I could give you an estimate, but it is silly to say it happened to me 10 times if I can't say it would be more than 10 times, but it would be a number of times, not to me only, but to everybody. During my daily run, the number of times that I would handle a retriever would depend on the run. The conductor changes trolleys at each end of the run. He pulls one down and puts the other one up, and during the course of the trip you may loose it once, may not loose it at all, and may loose it a half a dozen times. And on other occasions this thing has happened. I knew the normal operation of the retriever, and if you pull the rope out real quickly it would trip, it has happened to me that by pulling out the rope real fast that it trips on me. On occasions that this would happen, sometimes it would wind itself up and you start to reset it you are ducked away while you are pulling it. All of a sudden it will take you on in. It is supposed to work on a ratchet. This particular experience that I have had has happened on other streetcars besides car 123 and with other retrievers. I didn't operate this particular retriever on that car any other time than what I have testified about. We started the run in Alton. I was to just have one run that morning, I was working a split shift and we dead-headed back to Granite City and I was off at that time. My car was crowded when I left Granite City and there were other people on the car besides Mr. Gages.

I was not rejected for military service because of phy-

sical disability and I was not rejected. I was in Navy construction in the Navy Yard, my qualification as an ex-workman sent me there. The thing that happened on the par- [fol. 74] ticular morning in question happened on other occasions as we went into the station and it happened very often. I performed the same type of operation on the same type of retriever and streetcars on these other occasions that I did that morning. That happened quite frequently and was not anything unusual. What happened on that particular morning was that the trolley had followed the wire and the streetcar was going in another direction on track 3 and the trolley tripped. The retriever pulled itself down. I had to reset it but I didn't get the chance to reset it. That is the only time that pole had gone off that morning. When the pole was up and beyond the wire, that's what you call tripping the retriever, and the retriever had tripped and brought the pole down to the car —the pole had tripped itself—then the normal operation would be to set it to pull it up to the wire. I didn't set it. I couldn't. I pulled it out. I don't know what terms you'd have to use. I was pulling the pole up slowly when it slipped again and the pole came down the trolley. When it tripped it pulled me along and I held onto it. This was the same thing that has happened to me on other occasions. I had both hands on the rope and I was standing in between the cars and I don't remember whether I was on the rail or on the flat ground. I couldn't pull it back to reset it. I reached over the draw bar and took hold of the rope and pulled the other. That is the center bar. I had the doors opened on my streetcar and I got out on the right-hand side of the car. I had both doors open and didn't get all the way back on the car, I just got up where I could hold on and rode the car into the station, just a short distance. After the passengers were discharged Mr. Elder pulled out the trolley and [fol. 75] pulled it underneath the hook and when he pulled it out he evidently set it. It doesn't necessarily have to be set when you put it under the hook. I presume he did reset it. I saw him pull it out. I was standing at the side of the car in the middle, back from the middle toward the rear end. When I rode in with the passengers I stepped aside from the door and let the passengers go out, and I stood there all the time while they were unloading. I don't know

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how long it took them to unload. We all got on the front car and rode it back to Granite City. I didn't say anything to the fellows in the streetcar about what occurred when we went back on the streetcar. When we got back to Granite City, I got out on Madison Avenue. I walked over toward the clubhouse and lined the switch, by that I mean that each train has a certain track to come in on in the yards. I am not certain but I think it was track 7 at that particular time, either 6 or 7, and we sent our cars in there. I had to throw a switch by lining it. That takes some physical exertion to do that. You have to pick up the device and turn it all the way over for those rails to go over and that's what I did. Then I went over and got in my car. I don't know if there was anybody in the barns that morning or not. I was not in the habit of going upstairs and I don't know. I didn't report to anybody after the run, but I was nauseated and sick, not so much then as I had been. The nausea and sickness had not left me from the time I discharged the passengers and gone over to the car barns. At the time it happened it made me terribly sick, it was all of a sudden. When I got back over to the car barns, I threw the switch and said nothing. I was out there by myself, conductors have duties to perform. I don't remember seeing any of [fol. 76] the other crewmen or talking to them after I got back to the yard. Generally I always took the car members up to Twenty-third Street, where they could catch their train, whether I did that morning or not, I don't know. I knew I was to meet somebody in Wood River and I had a contract with Mr. DePaula and I was to help Mr. Martin do that work. My first intentions were to help him do the work on the roof. I don't know how long I stayed up there, it was about half an hour. I got to my home around 8:30 and I drove my car up there by myself. The first one I saw in Wood River was some relation of Ray Phillips, they were working on the side of the house. I got home, I sat at home, and I was so sick that I didn't eat anything, I was afraid to, but as I drove along it didn't seem to bother me too much, sitting still, but when I started to get out of my car I couldn't hardly move. When I came back from the station across Madison Avenue and walked over to throw the switch and got in my car and came home I was not too nauseated at that time. I got to Wood River around 9:30.

Mr. Schuman: Q. You testified at a deposition, did you not, Mr. Harsh?

A. Yes, sir.

Q. That was taken in the presence of Mr. Chapman, is that right?

A. Yes, sir.

Q. On March 8, 1951, is that right?

A. I don't know.

Q. Well you did testify?

Mr. Chapman: We will agree it was.

Mr. Schuman: Q. Now, on page 31, was this question [fol. 77] asked you and did you make this answer:

"Q. Did you move any ladders on your own accord?

"A. I attempted to help the carpenter on the job move one."

The Witness: Yes, sir, I was telling you about that.

"Q. I thought awhile ago you said you were going to help Harry, the carpenter?

"A. I said I was going to attempt to move a ladder.

"Q. Is that correct?

"A. Yes, sir.

"Q. Did you make that statement?

"A. Yes, sir.

"Q. Did anybody move it while you were there?

"A. That particular ladder?

"Q. Yes.

"A. Harry moved his end of it.

"Q. How about the other end?

"A. It didn't move, it fell."

Q. Did you make those statements?

A. Yes, sir.

"Q. It fell without anyone being near it, is that right?

"A. I was going to pull the ladder down about a foot, there were two ladders leaning against the drain on the roof and we were going to scoot it down. I said: 'I'll see if I can help you,' and as I reached over to try to pull it, I couldn't pull it, he shoved his but mine wouldn't move, I couldn't move it."

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[fol. 78] The Witness: A. I attempted to move the ladder, yes, sir, that is right.

Mr. Schuman: "While you were in the act of helping Harry, the ladder did fall down?"

"A. Yes, sir."

Q. Is that correct?

A. Yes, sir.

Mr. Chapman: What is impeaching about this?

The Court: Is this for impeachment purposes?

Mr. Schuman: Yes.

The Court: Now, isn't the law this that you can't impeach a person on anything not material?

Mr. Schuman: I think this was very material about the nature and extent of how he got this injury. He said he was trying to lift this ladder up here, your Honor.

The Witness: A. I did not.

The Court: I don't think you are making any progress, go ahead.

Mr. Schuman: Q. When you moved this ladder had this occurred before you made your phone call home or after?

A. After. You mean the ladder?

Q. Yes, sir.

A. Several hours later—not several, but a few hours, I said several, it is too many.

Q. I thought you said you called home around 9:30.

A. I called home between 9:30 and 10:00.

Q. Did you call home before you moved the ladder or after?

[fol. 79] A. I didn't move the ladder, Mr. Schuman.

All that is written on Plaintiff's Exhibit 1 is in my own handwriting. When I left Wood River I came down and went to Dr. Grzesk that afternoon after I got a slip from Mr. Quigley. With reference to the retriever that I got and took to Mr. Chapman's office, I just went down to the car barns and got it. I didn't request anybody to get it. I don't know whether anyone knew that I took it or not. Mr. Chapman asked me if I could borrow one. This particular retriever was not on any streetcar, but had been worked on. There was a rope in the retriever at the time but it was not on any particular streetcar. On the particular day in Wood River I did not go to the roof to help

at all on that particular day. After that I was upon the roof on the little end over the porch and that was since the incident occurred. I didn't do any other kind of physical manual labor besides driving buses after the injury. I did help drive some nails for Mr. Martin on his building and I assisted another Mr. Martin one evening and Bob and I helped him a little bit. I was upon the ladder but that was months after the injury and when I speak of Bob I mean Mr. Meyer. On the Meyers house that was a roof job I was up on Bob's house. At the present time I don't have much nausea, but it has not gotten progressively better. The pain and nausea is not continuous, if I do anything strenuous at all, it will bother me. I weigh about 190 pounds and it has not interfered with my weight, I started gaining weight in the last two months. I wouldn't say that it has gotten to feel better. I don't know whether I have less pain or more pain than I had before but I am still as nervous as I was and the reaction from the testicle is still the same. [fol. 80] I still have trouble with my testicle and I didn't have the nervousness before, and I didn't have the testicle condition before. It has interfered with my natural habits.

PAUL KLINE

Direct examination.

My name is Paul Klein and I am a mechanical engineer, a graduate from the Missouri School of Mines and Metal Work, Rolla, graduated in 1950. Since my graduation I have been employed in the engineering line at the American Steel Foundries in Granite City. I had occasion to examine a trolley retriever at the Dodge-Plymouth dealer in Granite City.

Mr. Schuman: That is objected to at this time for the further and additional reason that in the cross-examination of Mr. Harsh it has been shown that the retriever was taken without the permission of the company and with no permission of the company, and therefore was taken, we might say, almost stolen.

Mr. Chapman: It was returned to the company.

Mr. Schuman: Not as far as we know.

The Court: Overruled.

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I had occasion in the presence of others to examine the trolley retriever on August 20 and I examined it one time later on September 16. I disassembled the retriever. I became familiar with the inner workings of it. The retriever has two coil springs—the upper portion has a coil spring and a coil spring in the lower portion, and the spring in the lower portion is inside a spool in which the core wraps around—going from the upper spring there is a paw mech- [fol. 81] anism in which this upper spring fastens on to it. In this paw mechanism there is several catches in which they interlock with several gears. There are three gears in this retriever, one on the inside of the upper portion of the retriever, one on the upper portion of the spool and one fits on top of the spring which is the upper portion also of the spool. As this retriever is on the main spring, the center spring, the lower portion spring is tightened up, there is a catch which catches onto this inner gear, and as this inner gear catches there is a mechanism which will take out this dog from the outer gear, and as this dog is kicked out of the outer gear the rope on this mechanism will come up on the tension of the upper spring. And that is the general operation of it. When you disengage the inner spring so that the rope is operating on the upper spring the rope is relatively free. There is a winding motion, a tension of the upper spring. During the course of my examination I had occasion to trip it and cause the retriever to operate. The way I did that was just if there is a severe pull on the rope, it will cause it to operate. On the actual retrieving movement what happens is that this spool or this bottom portion of the retriever will accelerate faster than the tension on the upper spring which will cause this dog to slip out of the gear and cause the retriever to retrieve. In the normal operation of the retriever the inner gear retriever mechanism will work only when there is a sudden jerking of the trolly pole. If the retriever were to retrieve on a normal or slow feeding or pulling out of the line it would not be working properly.

[fol. 82] Q. I say if the inner mechanism were to retrieve at the time the rope was being pulled out slowly without any jerking, would the retriever be operating properly or normally?

Mr. Schuman: We object.
The Court: Read the question.

(Question read by reporter as above recorded.)

Mr. Schuman: We object, he has not testified there was any such thing occurred in his experiment here about slowly pulling—it is calling for a conclusion.
The Court: I think you should lay the foundation of what he did.
Mr. Schuman: That is all he can testify.
Mr. Chapman: He is an expert.
Mr. Schuman: An expert on retrievers?
The Court: See if he did these things.

Q. I will ask you this question then—if the retriever were to operate while there was a normal slow pulling out of the line, if that inner mechanism were to retrieve, would the retriever be operating properly?
Mr. Schuman: That is objected to, he can only testify what he did and how it acted when it performed. Now *he* asking if it pulled slowly.
The Court: This particular retriever was the one he was asking about, the one he brought in there to check on.
Mr. Schuman: It was not on the streetcar—it was in the shop.
The Court: He can testify what the result was, what he did and limit it clearly to that.
[fol. 83] Mr. Chapman: What is your ruling on the question, you Honor?
The Court: Well, you were both talking, I don't know whether I got it.
Question read by reporter as follows:

Mr. Chapman: Q. I will ask you this question then. If the retriever were to operate while there was a normal slow pulling out of the line, if that inner mechanism were to retrieve, would the retriever be operating properly?
The Court: I think that calls for a conclusion of the witness. He can testify what he did and what the result was.
Mr. Chapman: For the purpose of the record plaintiff states that if this witness were permitted to answer this question that he would answer that the retriever were not properly operating.

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The Court: Under what conditions?

Mr. Chapman: The conditions asked in the question.

Mr. Schuman: You just asked if certain things were done would that happen?

The Court: Just a minute. I understand if you are going to make an offer of proof you state the question you propose to have him answer and then tell what you want to prove.

Mr. Chapman: We have the question here, and you said it is not proper to answer. Now, all I have to prove in the record is if he were permitted to answer this question that he would answer that the retriever would not be properly operating under the circumstances assumed in the question.

The Court: Suppose you ask him what would be the result if the retriever were working properly with reference [fol. 84] to that matter. Restate your question.

Mr. Chapman: Q. Mr. Kline, in the course of a slow pulling out of the rope from the retriever after it has been wound and set, would the retriever normally, then, retrieve or not?

A. No.

Mr. Schuman: That is objected to, for the same reason, if your Honor please. He can testify what he did and what he observed there.

The Court: Objection overruled. Proceed.

Mr. Chapman: What is your answer?

Mr. Burroughs: That is further objected to——

The Court: Gentlemen, I think we have a rule here that where there is more than one attorney, that one attorney make the objections and not two. All right. Proceed.

The Witness: A. No.

Mr. Chapman: Q. Now, if the retriever, Mr. Kline, were to go into operation after it had been set on slow pulling out of the rope and retriever what, in your opinion, would be the cause of the defect, might or could cause that situation?

Mr. Schuman: That is objected to, for the same reason, asking for pure conclusion.

Mr. Chapman: I think not. He qualified as an expert and he examined it.

The Court: He may give his opinion as an expert.

A. "My opinion is that the paw mechanism would be some fault in the paw mechanism. There would be several reasons why it would cause it not to work properly. The main [fols. 85-96] reason would probably be where the teeth would probably be worn to a point where it would slip this dog out, which would cause it to retrieve. There are several small springs involved in this that would cause it to retrieve without any warning."

Q. And could there be a defect in one of those springs; is that what you are saying?

A. Yes, sir; there could be a defect in one of those springs, or it would slip out.

Cross-examination.

I am a mechanical engineer at the American Steel Foundry, and my title there is special engineer. I do all type of research work. On August 20, 1951, was the first time I had ever seen a retriever on a streetcar. At the time of the operation of the retriever, I used a rope and had it fastened in a vise. I couldn't pull it up or down. It would be a normal operation, but not in a normal position, the way I had it, as to the way it worked on a streetcar. I have never worked on a retriever on a streetcar, and the retriever I saw there was a Paul Warren.

Q. And were the springs broken?

A. No, sir.

Q. Now, if any of these things you call mechanical defects were in operation in this particular mechanism would it work normally and operate normally, if this particular thing you testified about, if the paw were worn and springs broken, would it work normally at all?

A. No, sir.

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[fol. 97] RAYMOND N. PHILIPS

Direct examination.

I am a bus operator and motorman for the Illinois Terminal Railroad and I have been acquainted with the plaintiff, Wayne Harsh. I live at 423 Anna, Wood River. On the 25th of April, 1950, I had occasion to see Mr. Harsh at my residence and I first observed him in front of my house at the door. He went into my house and after he woke me up I invited him for a cup of coffee. I had a hand in getting him the job at the Martin's house. When Mr. Harsh arrived at my house that morning there was not a bit of work done at the house. I was with him during the time he arrived until noon or after, pretty near all the time. Fellow by the name of Wydick, the carpenter, arrived there some time in the afternoon, because we had a cup of coffee in the restaurant. When we went back to the house he was standing in the middle of the street. I observed Mr. Harsh and he was not nearly as active as he usually is and he complained about his back. He was fairly slow in the movement part as far as that goes. I saw him get out of the automobile, a slow movement. He didn't jump out of the automobile. When we got out of the car and went to the restaurant [fol. 98] he was behind us. He couldn't keep up with us as far as that goes. He was walking behind us. Before the time we saw Wydick there there was not any work done on the roof whatever. Mr. Harsh had not done any work at all. I went over to where the roofing job was done. I would say it was around 1 before they did anything on the roof. He made a call some time that morning to his wife and I am not sure about the time. I have had occasion in my work to work with retrievers and trolleys. I am familiar with the normal operation of them and I have had occasion to be holding on the rope on the trolley and have it retrieve. I weigh about 150 pounds. When you are holding on the rope, if you are not careful, it will carry you right in. I would just as soon let loose of that rope if I am not able to hold it. I am able to hold it if I put a stout grip on it; in other words, if I *break* myself.

Cross-examination.

I am friendly to Wayne Harsh as far as speaking goes. He came over to my house and I got out of bed and fixed the coffee. I did not, in the course of the morning, see Mr. Harsh on the roof of the house. There was no work done on the roof. I did not see him on the roof that afternoon. He was on the roof later on. He was just sitting up there. That was a couple of days in there. I am not sure which day it was. I have a way of fixing the date on which Mr. Harsh woke me up and later used the phone, because we had bought a sewing machine and we had to sign a contract on that particular day. It was around the 25th. I could look it up for you. I talked with Mr. Edrington of the Claim Department of the Illinois Terminal Railroad, and [fols. 99-103] when I told him the date I got the check stub that I wrote out for the down payment on the sewing machine. That is about the only thing I could go by, and I don't remember just what I done with that check. I actually don't remember. I am not good at remembering dates. I did not tell Mr. Edrington that I saw Mr. Harsh working on the house on the morning of April 24, 1950. I made a statement that he was on the roof. As far as the actual date, I don't believe I said the actual date. He was on the roof, but the exact date I don't remember. We finished the De Paula roofing job. I saw Mr. Harsh up on the roof one time. I don't recall how many times I seen Mr. Harsh on the roof. He was not working when I seen him. He was not doing any actual work, no labor or anything. When I saw him he was just sitting on the roof doing no work.

Redirect examination.

The exact date of this incident was the first work that they started to do actual work on the job.

Recross-examination.

I don't remember telling Mr. Edrington that I observed Mr. Harsh that day and from his general appearance I couldn't detect anything wrong with him.

[fols. 104-117] Thereupon the plaintiff rested his case. Motion for directed verdict at close of plaintiff's case.

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denied by trial court, appears on page 210 of the record herein.

At the time that the defendant presented its motion for directed verdict, at the close of all the plaintiff's testimony, it was requested that the court allow the defendant to be heard and submit authorities on said Motion. The Court denied the request and over-ruled the Motion. To which ruling and action of the Court in denying said request and over ruling said Motion the defendant, by its counsel, then and there duly excepted.

DEFENDANT'S TESTIMONY

[fol. 118] CHARLES ELDER

Direct examination.

I live at Alton, Illinois. I am 68 years of age and a motorman and am employed with the Illinois Terminal Railroad for 21 years as a motorman. I have been engaged in the transportation branch, and on a run from Alton to St. Louis. I was the motorman on car 123 on the morning of April 25th. Mr. Harsh was conductor on that car, Mr. Greene was conductor on the second car and Mr. Campbell was conductor [fol. 119] on the third car. I recall the morning of April 25th, going into the tunnel at St. Louis Station. We arrived about 7:50, I was on the front train, there were three cars on the train and I was on the front part of the first car and that is car 123. The entrance doors on the particular car were near the center on both sides. The door which I get on is located on the right hand side, the right front. The cab is located on the front and to the right side. The controls where I was are on the right side, that means facing the direction in which the car moves. I remember the occasion when we went into the tunnel when the trolley didn't follow the right wire. As we went in on track 3, I knew the pole would continue on track 2, which it did, so I stopped and Harsh set it over on track 3, I pulled up and Campbell closed the switch. Then we broke off I would say a couple of hundred feet there is an overhead cross over where there is a "Y" and I think that is where the trolley came off the second time. When the trolley came off the second time Harsh went through the car and pulled it down and hooked

it down on the second car and I went on into the station. I was able to observe what Harsh was doing and I was able to observe where he put the poles. I knew that the back pole was up when I was pulling in there. I was able to see that because I had the cab door open and was standing in the door. To see him do that I would have to turn in the opposite direction. He got out of the train on my side. When he got out the second time he just went back as quick as he could and pulled the rope or retriever out. I don't know why he never told me why he hooked it down and put the other one up, it didn't make a bit of difference. He hooked the other one down, he put it on the hook. He put the trolley on the second car on the trolley wire. I don't [fol. 120] know whether he made any attempt from where I could see, to place the back trolley on the first car up on to the wire again when he went back there. It was done so quick, he was in there but a few seconds and right out again. After he laid the trolley on the second car he went on and got on the door and we pulled on in. I got off the front end, closed my door and called the train dispatcher. I came out of the phone booth, I observed the other trolley. I walked down and seen that was up, didn't have to put it up, and walked by the front car and I think Mr. Campbell put that up and we went back to Granite City, with the two poles up. The trolley that had been on the back end of car 123 going in was in the hook when I came out of the telephone booth. When we were going back to Granite City, car 123 was the tail car. It was a dead-head run. Members of the crew rode up at the front car on the trip back to Granite City. I had no conversation with Mr. Harsh on the way back, or at any time around the tunnel. He did not tell me at any time that he had been injured. With reference to Mr. Harsh's actions that I observed that morning on the way back to Granite City, I didn't notice anything out of the ordinary any more when we took the car back over there and put it in the yards. Mr. Harsh at that time, that morning, or since, did not ask me to file any report of his injury.

Defendant's Exhibits L and M, being photographs of the car, were marked for identification. The witness was handed Defendant's Exhibit L, and identified that as motor car

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No. 123, and that was a photograph of the car that he was operating on April 25th, 1950. That there has been no [fol. 121] physical changes since April 25, 1950, and that picture correctly represents the position of the retriever on the car and the trolley pole and hook. There was no objection offered by plaintiff to the defendant's exhibit.

Defendant's Exhibit M was offered for identification purposes and identified as the same car, as 123 and 122, and the picture taken at the same time. This exhibit showed the two cars coupled together. Pictures show a retriever on the car and the same type of retriever that was on the car that morning.

Cross-examination.

I only know of one type of retriever and I have been with them about 20 years and that is the only type I ever saw. Cars 122 and 123 were hooked together on the morning like they show in the picture. I don't know what happened between those cars other than what I could see down the side. The center doors swing out and they don't block your view very much, they are not wide. They are out some distance. I could see over the tops of the doors. Harsh was back there, I think he pulled the retriever out. The business of pulling out the retriever would be to reset the pole. And he didn't reset the pole, no, sir, he hooked it on the hook and he set the pole on the second pole. It doesn't make any difference if you are backing against the pole. We run our cars in the subway like that down there. We don't run our main lines that way, we do in that subway, we back any way we want to. I recommend backing against the pole; we do that down there. I change the poles. The train end of the car was in the subway. It wouldn't make a bit of [fol. 122] difference about resetting the poles, he didn't have anything to explain or didn't tell me anything or I didn't ask him anything. When I testified in the deposition in 1951 I stated that the normal thing to do to avoid pulling in against the pole would have been to reset the rear pole on car 1 and that is what I would have done if I had been out there. That's what I would have done under normal circumstances. I said it didn't make any difference which way I pulled it. I have discussed this case with any-

body I wanted to. I didn't go about talking generally to people. I have never talked to Mr. O'Donnell about this case, I never heard of Mr. Edmunton. I know Mr. S. Edrington. I haven't been out in the hall talking to Mr. Edrington about the testimony, I talked to him when I got—I don't have to tell anything I talked about. I may have talked with Mr. Edrington about the case. He never discussed with me about what I was going to testify to. I was going to say the truth and that is all. They never asked me what I was going to say. I talked with Mr. Burroughs and Mr. Schuman about the case two or three times and I told them what I had seen, but I didn't discuss with them about what I was going to testify. I was talking about something else part of the time. The retriever has not jerked me in the course of resetting it and pulling it and I have set the retriever more than the conductors have.

Mr. Chapman: Were you asked this question in your deposition—page 18:

"Q. Now, you mentioned that you had had experience with the trolley retriever when you had already pulled the retriever out or pulled the rope out of the retriever for the purpose of resetting it, and then having it rewind on you. Has that happened during the course of your time?
[fol. 123] A. Yes, sir, they trip on you most any time."

The Witness: Yes, sir, they will trip on you.

Mr. Chapman: Well——

Mr. Schuman: Let him answer.

The Court: You are reading his answer from a deposition, confine it to that.

Mr. Chapman: I just asked him if he made that statement, he said he did.

The Court: All right, proceed.

Mr. Chapman: In fact, I think you mentioned it happened on you that very morning of the deposition, the morning the deposition was taken didn't you?

The Witness: Why, it is liable to happen on us any morning on any trip.

Mr. Chapman: All right. I think that is all.

Redirect examination.

What causes the retriever to trip is in case the trolley pole jumps off the wire to keep their pole down overhead. A jerk movement would cause the retriever to trip. Mr. Harsh took my deposition, that is right, and he inquired about all of the events of the occasion.

Mr. Chapman: We will stipulate to that.

Mr. Burroughs:

Q. Mr. Chapman just asked you whether this question was put to you: "Q. Wouldn't the normal thing to avoid pulling in against the pole have been to reset the rear pole on car one?" and your answer was: "A. That's what I would have done if I had been out there."

[fol. 124] Q. And didn't he then ask you:

"Q. That would have been the normal thing to do?" and didn't you tell him at that time it wouldn't make any difference.

A. I think I told him it wouldn't make any difference.

Mr. Burroughs: That is all.

Mr. Chapman: That is all.

JAMES LEROY GREEN

Direct examination.

I live at 2845 Iowa St., Granite City, Illinois, and am 28 years of age. My occupation is conductor for the Illinois Terminal Railroad Company for about 7½ years. I was a conductor on the train that went to St. Louis on the morning of April 25, 1950. Mr. Harsh was on that train in the capacity—well, he was on the head car, car 123. I don't remember the car I was on—I was on the second car; I recall going back to the Granite City Garage after the run to St. Louis. I rode on the front car with Mr. Campbell and Mr. Elder and Mr. Harsh. Mr. Harsh didn't make any complaint to me that morning about being injured. I didn't notice anything unusual about his general physical appearance. Mr. Harsh didn't ask me, at any time, to make out any report of an accident. He has not since that time asked me to make out the report of an accident. I am familiar

with the company rules in the operation of trains and in regard to reports of accidents for personal injuries.

Cross-examination.

I know what happened down in the subway and tunnel [fol. 125] regarding this trolley. The jumping of the pole on two occasions and on the first occasion Mr. Harsh reset the pole. I could have possibly have done it, too. I am a little hazy about that, it jumped the second time I was on car 2, I didn't get out of the car, I stood on the steps because we were coming in late, I might have stepped down on the ground. But I didn't move away from the door. I was in position to see Mr. Harsh go out to retrieve the trolley and reset it, and he pulled the retriever and he pulled it out and it seemed like it tripped again. He put the front trolley up on my car, but as I recall he still pulled the retriever out on it. I didn't say in my deposition that it was already set and it wouldn't be necessary to pull it out, because it would have to be pulled out, because it would be tripped. It could be put underneath without being tripped, but it wouldn't be safe, because you could pull it out from under the hook, as a matter of fact, it wouldn't stay under the hook.

Q. Can't the retriever or the trolley pole be hooked underneath the hook without the retriever being released?

A. It wouldn't stay under the hook because it will keep on pulling down until it stops.

Q. Will you answer my question—can't it be put——

A. Can it be put under the hook or can it be secured?

Q. I said, can't it be put under the hook?

A. It can be put under the hook.

Q. Let me ask you about your testimony taken about the time of the deposition in this case, page 41:

"A. Do you have to pull the retriever all the way out?

[fol. 126] "Q. The rope all the way out of the retriever?

"A. No, you can hook it down underneath it, but it will pull down hard enough for it to pull out of the hook, you see.

"Q. No, you can hook it down underneath it, but it will pull down hard enough for it to pull out of the hook"—is that what you said?

The Witness: Yes, sir.

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Q. What would be pulling down?

A. You have a continuous pull down to pull down to unhook—that trolley wouldn't be resting on the hook at all, it would be down on the trolley stand——

When the retriever has been released of the pull on the rope, it is just the top spring it might wind in and out. But you told me it had not been released the second time. There was no necessity to pull the retriever out on the second car because the second trolley was already retrieved and the retriever released and that's all he had to do. All he had to do on the car that I was on was pull it out from under the hook. He didn't have to wind the retriever out. I have had occasions when those retrievers have tripped. They have quite a bit of tingle of the springs, I have had them pull me in before I could let go.

Direct examination.

Defendant's Exhibits L and M are cars 122 and 123 coupled together and the front end of car 123. I was present when those pictures were taken. Exhibit L is the front end and Exhibit M is the rear of car 123. Those pictures correctly represent the physical appearance of the ends of the cars as they appeared on April 25, 1950. The item on [fols. 127-129] the rear of the car in Exhibit L is the trolley rope and the retriever. And the button on the end of 123 is the trolley rope retriever.

Recross-examination.

There really isn't any front on these cars, they can be run in either direction, they are just as capable of running from one end as the other but we always consider the front the number one end, that is just an opinion because of the master switches being there. I weigh about 190 and within 10 or 15 pounds of that within the last year or two while working for the company. Defendant's Exhibit L was offered and received in evidence, objection was made to Defendant's Exhibit M and a rejection sustained (Record ——).

[fol. 130] CECIL CAMPBELL

Direct examination.

I live at 109 Thirteenth Street, Wood River, am 32 y[illegible] of age and a conductor on the Illinois Terminal Railroad and have been for five years. My last occupation was in the Navy, and that was from February 26 to July 20, 1951. I was a conductor on an Illinois Terminal Train on April 25, 1950, it was a morning run from Alton to St. Louis, I was operating on a split shift that day. Part of the run was in the morning and part in the afternoon. On that train was Mr. Elder, Mr. Harsh, Mr. Green and myself. Mr. Elder was the motorman, Mr. Harsh was on the front car as conductor, Mr. Green was in the middle car. I don't recall the number of the first car, I don't recall what car I was on. I recall an incident that occurred going into the station that morning when Mr. Harsh was conductor on the car. I recall the trip back to Granite City. I rode back on the car that I had and that was the motor car on the return trip. On the car with me were Mr. Elder, Mr. Harsh and Mr. Green. On the trip back to Granite City, Mr. Harsh did not make any statements about being hurt that morning on the retriever. He did not ask me at that time to make any personal injury report. His appearance that morning on the trip back from St. Louis to Granite City was the same as always. He did not appear to be in any pain. I did not notice any pained expression on his face. He has not, at any time since that morning, asked me to make any accident report with reference to any injury he may have received that morning.

[fols. 131-134] Cross-examination.

I don't remember the car I was on, I don't remember anything particular about that morning other than Mr. Elder made the statement when I got on the car with reference to the effect they had to back in against the pole. That was not the normal manner of doing it. I don't know that Harsh had hurt his back and had to use the pole on the other train. I go back and forth on that road every day and I sit with the same bunch of fellows every day that are on the trip. I can't tell you anything about the trip on April

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30th, May 31st, or July 1st. I wasn't there July 1st. I was in the service in Japan on July 1st.

Redirect examination.

I remember about April 25th because of the fact of this trial, Mr. Harsh brought suit against the company. I don't know whether Mr. Harsh made the run on the afternoon of that day or not.

[fol. 135] FRED C. BARNHART

Direct examination.

I live at 206 West Hale, Edwardsville, Illinois, and am employed by the Illinois Terminal Railroad Company as [fol. 136] Shop Foreman at the Granite City Car Barns. My duties are supervision of work on all company equipment. I keep records on work that is done. There is a shop report made every day of the work done. In the daytime I make out these reports and at nighttime, Alton to St. Louis, the man that was on duty made them. As to the repair work done on car 123 with reference to the retriever, the retriever could be changed either at Granite City, St. Louis or Alton. We have shop reports from all these three places about any repair work done to retrievers and these are original records and I have them with me. Street cars have a regular inspection period, every 1200 miles. I mean by 1200 mile inspection period that the car is inspected, this inspection period we put up and check all the equipment of the car, we make adjustments, repairs that are not noticeable in the normal operation. If there are any repairs needed on a car while in service, there is a form of report made out, that is a written report. I have these reports with reference to car 123 and they cover a period from April 1, 1950, to May 15, 1950. At the time the incident occurred that is involved here, I was shop foreman in the same position on April 25, 1950, and those records were under my direct supervision and control. Some of these shop reports are sent from St. Louis to Granite City and I check them and turn them over to the Superintendent and they are the original reports in the man's own handwriting. These records are in the same condition as they were when

they were reported and sent to me and under my supervision. The block of paper referred to is on form 4446.

Q. Your form 89. You testified that those reports there [fol. 137] were made with reference to car 123, did you not?

A. Not all of these. That is the complete shop report there. They do take into consideration car 123. In examining these reports there was no repair work of any kind done on car 123 with reference to the retriever on either end of the street car. I also have another report form, 44-11 (old 253 called Inspection card) and these are the cards that I am speaking about on the 1200 mile inspection. These records show cards running through the period April 21, 1950, to May 4, 1950. On these inspection cards there is typewritten on the report "trolley and retriever." The report would not show repairs on retrievers, but it would show the car is o. k. at the completion of inspection. These reports, through the period of time testified, do not show that the retriever has ever been inspected as needing repair. To my knowledge, during the period of time that I have testified to, the retriever on car 123 has never been repaired in any way, shape or form. This was in respect to both retrievers. In inspecting these cars my shop men go out and bring them inside the shop, they are brought in under their own power. They put up a trolley pole and two men usually bring them in, the motorman and the switchman. At that time both retrievers are used in the operation, that is the front and back retriever. During the period that I have testified that the cars are inspected, the retrievers are used in the operation. The cars are inspected daily, once every 24 hours. This does not necessarily mean that it is run into the car barns, it may be on the road and finish the run in Alton, the Alton man will inspect that car. It may finish up in St. Louis and the St. Louis man will take care of it. The 1200 mile inspections on these cars are made [fol. 138] under my supervision in the Granite City shop. And these reports that pertain thereto are under my supervision. On April 25, 1950, we had a form 45 with reference to car 123. This form was produced. Defendant's Exhibit O was identified as form 45 and that is the form that is reported to me after a car has made its run. I received a report that morning on that particular car and received this

report from the club house fellow on car 123. The only thing shown in that report showed the standard pye stopped up on number 2 end. It does not show any defect with reference to either retriever on car 123. That is all that is shown on that report.

Cross-examination.

Q. Mr. Barnhart, do these all cover car 123 or is that all the cars?

A. That is all the cars.

Q. And where are your repair sheets on these cars?

A. These are the repair sheets. This is the work here that is performed and this is the form of Granite City shop between these hours.

Q. Do you have some entries here about repair of retriever?

A. The fact that these men change a retriever, they do not repair them, these men will not change retrievers.

Q. On the car number——

A. Yes, sir.

Q. Can you show me one of those on these reports——

Mr. Schuman: If there was a retriever through the period.

The Court: It is cross-examination.

Mr. Chapman: Q. Show me one of those.

[fol. 139] A. You would have to go through them.

Q. Show me one of those reports that show there was a retriever repaired.

A. You want me to go through all these?

Q. Yes, sir.

A. I'll sure have to do it, because I sure can't figure it out to you.

Q. Have you been through this (indicating)?

A. Why, sure, but I don't remember back to 1950.

Q. When were you through them?

A. I would say last week, and the only time I picked these out if you will note are repairs done to car 123.

Q. Well, will you find me one entry in there about a retriever?

A. I will if you will give me time to do it.

Mr. Schuman: Just a minute—this covers what period?

The Witness: It covers one day, it is one day, the 15th.

Mr. Chapman: Q. There is no retriever in that whole day?

A. No, sir.

Q. Didn't Mr. Vassier and some of these fellows at Granite City work on the retriever——

A. No, sir.

Q. Haven't you a fellow by the name of Vassier who works on retrievers?

A. Yes, sir.

Q. Isn't that this job?

A. Yes, sir.

Q. Then one of the men passes on this——

A. No, sir.

[fol. 140] Q. Isn't it true that in the course of your operation you have a whole group in there?

A. No, sir.

I would say that maybe we have one retriever in the barn a month. I would say there is only one retriever a month in the barns undergoing repairs. Mr. Vassier has many jobs as machinist and this is one of his minor duties about the retrievers. We do not have 5 or 6 retrievers on the bench in the barns being worked on. I would say that in the last four weeks there has not been a retriever repaired in that shop. These retrievers can be accommodated from time to time—these men move from one job in the shop to the other. We don't actually have as many as 5 or 6 or maybe 10 because we don't have that many extra. We have 5. Retriever repairs is never shown on my shop report. I have no report that shows it, I can't show it.

Redirect examination.

These inspection cards refer to the 1200-mile inspection. They cover the period of time from March 21, 1950, to May 4, 1950. During that period of time there were 5 1200-mile inspections made on car 123. Every time the car runs 1200 miles it would be inspected.

Recross-examination.

The form 45 that was turned in on car 123 on 4 25 50 was not made by Harsh.

Defendant rests.

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[fol. 141] REBUTTAL

RAYMOND N. PHILLIPS

Direct examination.

I have already testified in this case. I worked on the streetcars for several years. I worked on them, off and on, about four years. I had occasions during that time to make some complaints about a retriever, and I have had something to do with turning a damaged rertiever in. The retriever is sent to the company for repair, and I don't know of any notations or data being given about when it comes off. I have never seen them make any.

Cross-examination.

Offhand, I couldn't tell you how many retrievers I have turned in in four years. If the rope would break over there, normally they would give you another one if they had one handy, and if they didn't they'd put a new rope in and rewind it for you. I never had to turn one in for bad order, because it don't do much good.

WAYNE HARSH

Direct examination.

I am the plaintiff in this case, and during the time that I have worked with the company, six or seven years, I have had occasion to have a retriever that was defective and needed to be turned in to the company. This occurred on several occasions. With regards to the retriever, as we approached the tunnel we give a blast of the whistle and the mechanics might hear. We go right by their tool room and just to the other side of that is the pit they put the trains over and work on them—when they are in bad order. They have a retriever there. If you ask for that retriever they take [fols. 142-147] this down, put another one on. I have never seen one tagged. I have taken them myself, on bad order equipment, back to Granite City, and they have no tags on and never anything put on but just bad order. Put them

in the place at Granite City, where they would be repaired, but there is no tag to identify what car they are off of.

Plaintiff rests.

No rebuttal for defendant, and defendant rests.

MOTION FOR DIRECT VERDICT

Defendant here tendered his written motion for directed verdict at the close of all the evidence (Record ——) as follows:

"Now comes the defendant, by its attorney, at the close of all the evidence in the case and moves the Court to give to the jury the following written instruction:

"The Court instructs the jury to return the following verdict:

"We the jury, find the defendant not guilty.

Illinois Terminal Railroad Company, by Burroughs, Simpson & Burroughs, Fred P. Schuman, Its Attorneys."

And the Trial Court reserved its decision thereon.

[fols. 148-149] ABSTRACT OF APPELLATE COURT RECORD

[fols. 150-153] 42. Notation, that on November 7th, 1953 appellee made a motion to strike pursuant to Rule 75c of The Civil Practice Act, the portion of the judgment of the Court remanding the cause for a new trial, and that same is taken under advisement.

43. Notice and proof of service of appellee's motion to strike the remanding portion of the judgment, filed November 7, 1953.

44. Motion of appellee to strike the remanding portion of the judgment, filed November 7, 1953.

45-46. Affidavit accompanying motion to strike remanding order.

47-48. Order dated November 19th, 1953, allowing appellee's motion to strike the remanding order, and text of order.

[fol. 154] In the Supreme Court of Illinois

Petition for Leave to Appeal from Appellate Court Fourth District, 7230, 53 F 12

Order Denying Petition for Leave to Appeal—March 10, 1954

And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record and abstract, filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said respondent recover of and from the said Petitioner costs by it in this behalf expended, to be taxed, and that it have execution therefor.

I, Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

[fol. 155] Supreme Court of the United States, October Term, 1954

No. 125

[Title omitted]

Order Allowing Certiorari—Filed October 14, 1954

The petition herein for a writ of ceriorari to the Supreme Court of the State of Illinois is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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JUN 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 125

WAYNE HARSH,

Petitioner,

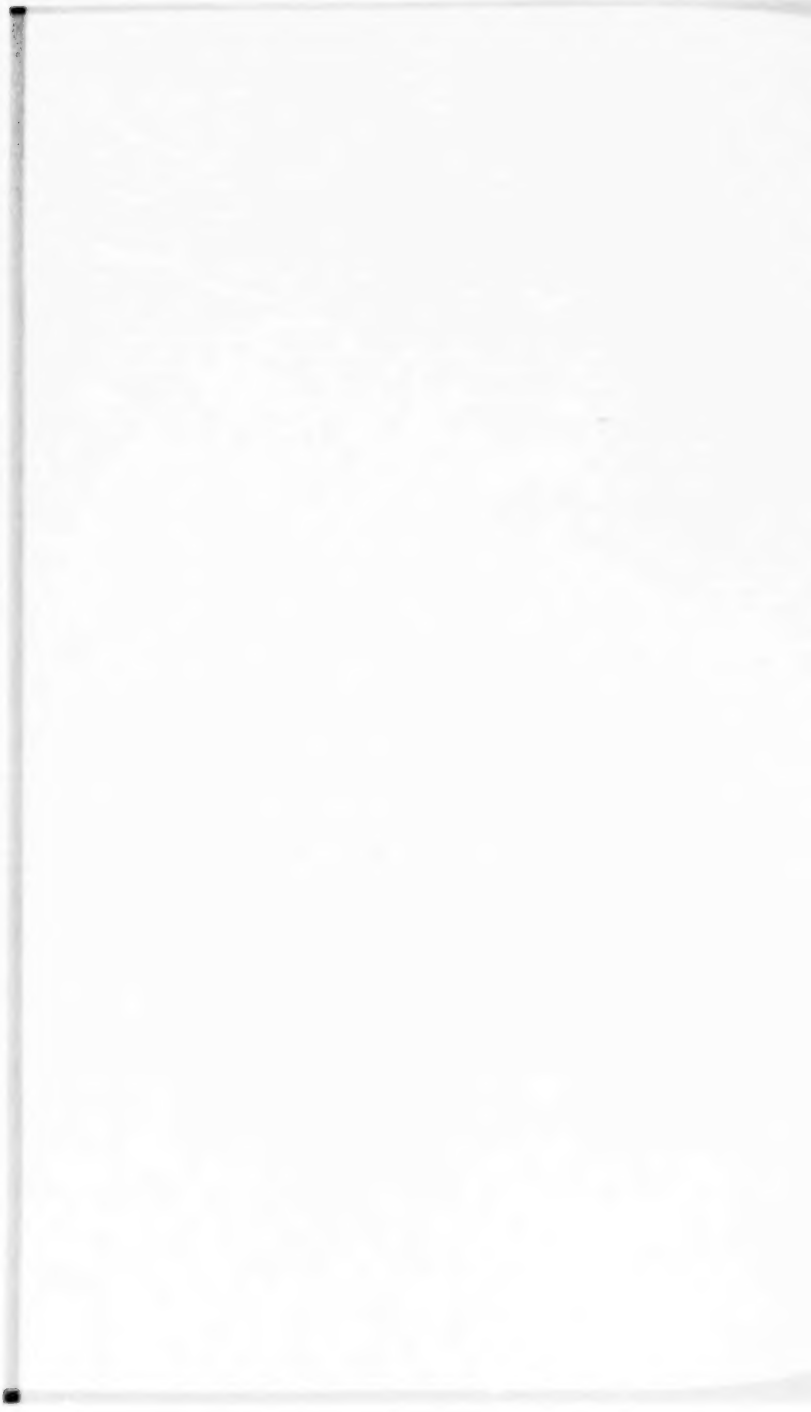
vs.

ILLINOIS TERMINAL RAILROAD COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

MORRIS B. CHAPMAN,
Counsel for Petitioner.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 125

WAYNE HARSH,

Petitioner,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

To the Honorable the Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

Wayne Harsh, respectfully petitions that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Illinois, entered in this case on March 10, 1954.

Jurisdiction

The judgment of the Supreme Court of Illinois was entered on March 10, 1954 (R. 154). The jurisdiction of this Court is invoked under 28 U.S.C.A. Para. 1257 (3).

This action was brought pursuant to Title 45 Section 23, same being a portion of what is commonly known as, the "Safety Appliance Act", being a companion act to the Federal Employers Liability Act. Plaintiff's Complaint was instituted charging the defendant specifically with violating the foregoing section of the Code (R. 12(3)). There is no issue as to the applicability of the act, and the Appellate Court of Illinois for the Fourth District decided this action conceding that it was governed by the provision of the Safety Appliance Act (R. 26.)

Opinions Below

The opinion of the Appellate Court, for the Fourth District of Illinois is found in 351 Ill. App. 304, 114 N.E. (2d) 901. Following the opinion of the said Appellate Court, petitioner, pursuant to Rule 75 (2c) of the Civil Practice Act of Illinois (Illinois Revised Statutes 1953, Chapter 110, Section 199, (2c)) struck the remanding portion of the Appellate Court's decision, thereby making same final and reviewable by leave to appeal to the Illinois Supreme Court (R. 150).

The Supreme Court of Illinois denied petitioner's leave to appeal (thereby making the judgment final by the highest Court of Illinois) without written opinion (R. 154).

Questions Presented for Review

1. Whether the state or Federal law governs the right of a state Appellate Court to set aside a jury's verdict, in an action under the "Safety Appliance Act", (45 U.S.C.A. Secs. — *et seq.*) as being contrary to the manifest weight of the evidence.

2. Whether the Appellate Court was correct in holding that petitioner's evidence concerning the defect in the car in question was against the manifest weight of the evidence.

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Reasons Relied On for Allowance of Writ

1. The Appellate Court for the Fourth District of Illinois, in an opinion now approved impliedly and made final by the Supreme Court of Illinois by its failure to grant leave to appeal, has boldly asserted its authority to usurp the function of the jury and to weigh the evidence, after holding that plaintiff had a submissible action in this case, which was brought under the Safety Appliance Act.

2. This holding is directly contrary to the holdings of this Court; those of the various inferior courts of Federal jurisdiction, and to the Appellate Courts of Illinois, including the very Court which decided the case at bar.

3. This Court has repeatedly held, that although Federal Employer and Safety Appliance cases may be instituted in State forums, by virtue of statutory permission in the acts, that the rights sought thereunder are Federal rights and that the law governing the adjudication of such cases is the Federal law. This Court has further held, that it is incumbent upon state courts in these cases to follow the applicable Federal law, rather than state authorities to the contrary.

4. In repeated cases brought to this Court where state courts have failed to follow the proper Federal authority in the particular case, this Court had admonished the state court and has granted certiorari to review and grant relief to a party deprived of his right to a trial under the proper Federal law in a state court.

5. It is, therefore, incumbent upon this Court in the present case to grant certiorari, because to fail to do so, is to not only to sanction the unlawful authority usurped by the Illinois Court in the present case, but to also permit a precedent to stand, whereby all state courts may each consider itself free to adjudicate each and every phase of Federal employer cases by their own particular rules and precedents. This would not only be in derogation of the clear Congres-

sional intent in enacting the acts to have their application governed by Federal law, but would also be in direct opposition to the previous holdings of this Court to the contrary.

6. The holdings of the applicable Federal authorities, including those of this Court are, that the reviewing courts in cases arising under the Federal Employer and Safety Appliance Acts are not, after finding there was a submissible case, to weigh the evidence or to search the record for some other theory or to substitute their opinion for that of the jury. In the case at bar the state reviewing court is guilty of not only weighing the evidence after having held there was a submissible case, but also of searching the record for an inconsistent theory whereby it could differ with the jury and reverse the case thereby.

The foregoing action by the Illinois Court has resulted in a direct conflict existing between the holdings of the Supreme Court of Illinois and those of the various United States Circuit Court of Appeals and of this Court as well in regard to the following question—Does a reviewing Court in an action under the Federal Safety Appliance or Federal Employers Liability Act have the authority, after having determined that a submissible case for the jury was presented by plaintiff, to then, hold such verdict to be contrary to the manifest weight of the evidence and to reverse on this ground? All Federal Authorities say no. The Illinois Supreme Court says yes.

Statement of the Case

On April 25, 1950, petitioner Harsh was a conductor on an interurban electric car operated by defendant between St. Louis, Missouri, and Alton, Illinois (R. 56). On the date in question he was working on a three-car train of defendant, which left Alton, Illinois, at 7:00 A. M. and arrived in the tunnel of defendant's depot in St. Louis about 7:50 A. M. (R. 56).

Upon arriving in the tunnel petitioner got off the car so as to set the switch and permit the train to go in on Track Three, the proper one for it (R. 57). While proceeding to cross the switch one of the two trolley poles which were supplying electricity to the cars jumped the wire, failing to proceed unto Track Three. One of petitioner's co-employees got off the car, pulled the pole down and placed it under the safety hook (R. 57).

As the train then proceeded on, the trolley pole on petitioner's car jumped the track and he got off of his car to reset the pole and was in a position between the first and second car (R. 57).

On each car near the center there is a retriever. It is situated about five and one-half feet from the level of the ground (R. 57). The retriever is attached by a rope to the trolley pole. When the trolley jumps the wire there is a sudden pulling out of this rope, which causes the retriever to operate and to wind the rope onto the retriever, thus lowering the trolley pole so that it will not strike cross wires or interfere with the continued passage of the car. The specific interworkings of the retriever are detailed by petitioner's mechanical engineer (R. 80 through 85).

After the trolley has jumped the wire and the retriever has retrieved the trolley pole it is necessary to reset the retriever (R. 58). When the retriever has become wound after a sufficient amount of winding, it locks and becomes set and the tension of the rope is gone and the rope can be played freely back and forth on the retriever (R. 58). After the retriever has been rewound it can be set again on the pole by a slow releasing of the rope and permitting a gradual ascension of the trolley pole to the line (R. 58). If the trolley were slowly permitted to ascend, then it is agreed that the retriever if properly operating, should not retrieve (R. 81).

Petitioner on the instance in question first pulled out the rope to rewind the retriever (R. 58). While resetting the trolley pole, and while permitting the rope to be played out in a slow manner, because of a defect in the retriever, the retriever suddenly operated, pulled petitioner between the two cars, severely injuring petitioner's back (R. 58). Petitioner stated that when the retriever pulled him it was as if he had been struck by something, and it immediately occasioned a terrible pain down his head and back (R. 58).

Unable because of his pain to reset the retriever on the pole in question, petitioner set the pole on the car behind (R. 59).

This pole was setting the opposite direction for the then forward motion of the car, and the car was backed into the tunnel against the pole, a situation used only in case of emergency (R. 59).

Petitioner was corroborated by defendant's witness Elder regarding the fact that the retriever was pulled out by him and that rather than placing that trolley on the line, which was the normal thing to do, he hooked it on the hook and set the pole on the other car (R. 122).

Also, petitioner, on returning to his car, was observed with a pained expression on his face and noted to be less nimble and agile as usual (R. 87). Without objection, petitioner's witness Gages testified that Harsh told him upon coming back to the car that he had hurt himself (R. 89).

Unable to aid in the discharge of his passengers as was his usual custom, Harsh rode dead-head back to Granite City with his crewmen (R. 59, 60). While returning with the crewmen he told two of them of his injury (R. 60). These employees testified for the Company at the trial and denied Harsh had told them about the injury.

Harsh stated his pain subsided somewhat, and that after he returned to the yards in Granite City, he went to his

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home (R. 59, 60). He was too ill to eat his breakfast and laid in bed for a short while (R. 60). Having made previous arrangements to assist in a roofing job in Wood River, he drove to Wood River (R. 60). While at the home of his friend and co-employee, Phillips, he called his wife and directed her to report him off work because he felt ill (R. 60). He was to go back to work at 2:10 in the afternoon for the second part of his split shift (R. 60).

Returning home about two in the afternoon, he stated his back was hurting more and more as time went on (R. 62). That afternoon he reported to defendant's dispatcher, Quigley, that he was injured on the morning run and received a slip for the hospital and doctor (R. 62).

He went to Dr. Grzesk, whom he believed to be a company doctor. The doctor examined him, gave him a hypodermic, and sent him home to bed (R. 62).

He didn't return to work until the following Sunday, being in great pain during this period (R. 62).

He suffered pain in his prostate and was sick to his stomach, being unable to eat or keep food down (R. 63). When able, some three days after his injury, on April 28, 1950, he went to the defendant's office and made a report of his injury, which was placed in evidence as Petitioner's Exhibit I. This report corroborates petitioner's version of his injury precisely as he testified at the trial. He noted in this report that the retriever was defective and that its sudden retrieving had drawn him in over the drawbar and injured him.

Petitioner was referred by defendant to several other local doctors who examined him but did not testify in the case. He was finally ordered by Company Doctor Hamm on May 19, 1950, to Missouri Pacific Hospital (R. 64). He was admitted there as a service employee, with a service injury, and his admission was approved by the general superintendent of defendant company (R. 64). This was marked on

his entry card (R. 64). He remained there until the 30th, being examined by various doctors but receiving little relief (R. 64).

He continued to treat with Dr. Grzesk of Granite City and was doing so until the time of the trial (R. 65).

During the intervening time, he has been wearing a canvas belt on his back for support and at times his pain would be alleviated, other times he was severely affected by pain and was unable to pick up or move things, even his baby. This was his condition at the time of the trial on September 19, 1951 (R. 65).

Petitioner testified to specific days of loss of work amounting to over $600.00 and in addition testified there were periodical times when he was unable to work (R. 65, 66). Although he had no complete record of his actual time lost, he also testified that he would sometimes go in the morning, work only two or three hours and then have to be relieved because of his sickness and hurting (R. 72).

Petitioner's wife told of observing petitioner's inability to work and flushed face when he arrived home on the morning in question (R. 101). She stated she had seen the petitioner go to work on occasions when he was unable to do so because he had to support the family (R. 101).

Petitioner's family consisted of himself, wife and four children, ranging in ages from a year and a half to 13 years old (R. 101).

Petitioner's attending physician, Dr. Leo Grzsek, testified concerning petitioner's injury. He was experienced in industrial surgery (R. 90). While in the service, the doctor was at LaGuadia General Hospital working on intervertebral disks as a surgeon (R. 90). While at this hospital, 90% of his work was of this type (R. 90). He did some of the original research work at that time in pantopaic, a contrast medium injected in the spine for X-ray purposes, which aids in the diagnosis of some disk conditions (R. 90).

The doctor testified fully about the condition of petitioner and his treatment. He testified as to the various neurological changes which had occurred in petitioner (R. 92). He stated definitely that petitioner had a concealed herniated disk (R. 92). This type of disk does not disclose itself in the X-rays made for that purpose (R. 93).

The doctor stated that a disk results from stress pain or degeneration of the pulpy material between the vertebrae causing impingement of the nerve (R. 93). Petitioner's disk he stated was of traumatic origin (R. 54).

The doctor testified that surgery might cure petitioner's condition, but is used particularly for relief of pain (R. 94). His prognosis of petitioner was, that he would remain as he was, absent a spontaneous cure which had occurred in few cases (R. 95).

He stated at the time of the trial that periodically petitioner was unable to work (R. 96).

Paul Kline, a graduate mechanical engineer from Missouri School of Mines, employed at the time as a research engineer for American Steel Foundries, testified for petitioner (R. 80). On two occasions he had examined, and on one occasion dissassembled, a retriever. The retriever in question was one belonging to defendant which petitioner had borrowed for the purpose of examination (R. 80). The defendant used only one type of retriever (R. 121). This retriever examined by Kline was shown to be the same type as was on the car when petitioner was injured (R. 66).

Kline described the interworkings of the retriever in detail and explained how it operated (R. 81, 82). He specifically stated that if the retriever recoiled when there was a slow letting out of the rope, that the retriever was defective and was not operating properly (R. 84, 85). He explained that when this occurred, it would result from a defect in the paw mechanism (R. 84). This he said could result from the wearing of the teeth to a point where they

slipped, and then several small springs could cause the retriever to operate without warning (R. 84, 85).

Defendant's witness Elder, who weighed 190 pounds, admitted that the retriever when tripped pulled with such force as to pull him into the car before he could let go (R. 126).

Defendant's witnesses, neither produced the retriever or accounted for its absence. Nor did defendant adduce any evidence concerning its condition at the time of the incident. (R. 25).

Defendant adduced several doctors, who denied, that petitioner was injured as seriously as he contended (R. 104 through 118).

The employees of defendants, who were crewmen on the car, testified, but they failed to witness the actual occurrence and their testimony was primarily directed towards denying that petitioner had informed them of the occurrence. (R. 118 through 127).

The jury found in favor of petitioner and awarded him a verdict of Twelve Thou[illegible]d Dollars ($12,000.00), and the trial Court after denying defendant's motions for new trial and for judgment notwithstanding the verdict entered judgment on the verdict in favor of petitioner (R. 51). Defendant appealed to the Appellate Court for the Fourth District.

The Appellate Court held, that petitioner had made a jury question, but that the verdict of the jury was against the manifest weight of the evidence, and reversed and remanded the cause for a new trial (R. 25, 28).

On petitioner's petition for rehearing, setting up the fact that the Appellate Court was without authority, under the governing Federal rules of law to hold the verdict against the manifest weight of evidence, the Court wrote an additional opinion specifically denying the petition and relied upon its "historical power to reverse and remand a case for

new trial when it believes the verdict to be against the manifest weight of the evidence" for so doing (R. 29, 30).

Petitioner, then pursuant to Rule 75 (2c) of the Illinois Civil Practice Act (Chapter 110, Section 199 (2c) Ill. Record St. 1953) struck the new trial and remanding clause of the Appellate Court's judgment, thus making it final, and sought from the Supreme Court of Illinois the right of leave to appeal from such final judgment, again raising the question of the right of the Appellate Court, under the governing Federal authority, to hold petitioner's verdict to be against the manifest weight of the evidence. (R. pages 1-20).

The Illinois Supreme Court denied petitioner's leave to appeal without opinion and petitioner seeks certiorari to review the now final judgment of said Supreme Court.

The Statute Involved

This suit was initiated under the provisions of the Safety Appliances And Equipment Act, (U. S. C. Title 45 Sec. 1 through 30), which in conjunction with the Federal Employers Liability Act (Title 45 U. S. C. Sec. 51 *et seq.*) will be hereinafter referred to as the act. There is no issue raised as to the act being applicable to the case at bar.

Section 23 of this act, which is relative to this case, reads as follows:

"Use of unsafe locomotives and appurtenances unlawful—Inspection and tests.— It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and

appurtenances thereof have been inspected from time to time in accordance with the provisions of this Act (§§ 22-29, 31-34 of this title) and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. (Feb. 17, 1911, c. 103, §2, 36 Stat. 913; June 7, 1924, c. 355, §2, 43 Stat. 659.)

Argument

The rights granted employees under the Safety Appliance and Federal Employer's Liability Act, are governed by the construction and holdings of the Courts of the United States and not those of the local Courts in the various states.

Bailey v. *Central Vermont Ry. Co.*, 319 U. S. 350 at 352. *Ellis* v. *Union Pacific Ry.* 329 U. S. 649 at 653. *Williams* v. *N. Y. Central Ry. Co.*, 402 Ill. 494-84 N. E. 2d. 399 at 405-406. *Grosse* v. *Terminal Ry. Ass'n of St. Louis*, 307 Ill. App. 414, 29 N. E. 2d. 1018 at 1022.

In *Bailey* v. *Central Vermont Railway*, 319 U. S. 350, the Court said at page 352:

"Section 1 of the Act makes the carrier liable in damages for any injuries or death resulting in whole or part from the negligence of any of its officers, agents, or employees.

"The rights which the Act creates are Federal rights protected by Federal rather than local rules of law (Citing authorities.)"

In *Ellis* v. *Union Pacific Railroad*, 329 U. S. 649, at page 653, the Court said, in regard to the standard of negligence liability in cases under the Act:

"Whether those standards are satisfied is a Federal question, the rights created being Federal rights (Citing authorities.)"

In *Grosse* v. *Terminal R. Ass'n of St. Louis*, 307 Ill. App. 414, 29 N. E. 2d. 1018, the very Court which reversed the case at bar, that is, the Appellate Court for the 4th District, at page 1022 of the Northeastern Reporter recognized this rule and said:

"Therefore, state courts are bound by the decisions of the Federal Courts in such actions." (Citing authority.)

The Appellate Court, in the case at bar, held petitioner had made a prima facie case for submission to the jury. In its opinion it noted that defendant had failed to rebut the inference of a defect in the retriever, on the car, and further stated: "In the absence of such specific rebuttal, plaintiff's evidence taken as true has sufficient probative force to require the issues to be submitted to the jury." (R. 25).

However the Court then went further, and stated that in regard to the evidence concerning the defect, the verdict in the opinion of the Court was against the manifest weight of the evidence.

In this last respect the Court exceeded its Appellate function by weighing the evidence and substituting its opinion for that of the jury.

This Court, the various Circuit Court of Appeals, and the very Appellate Court which decided the case at bar, (in earlier decisions), have all held that the sole function of a reviewing Court in cases under those Acts is to determine whether a submissible case was presented, having done so, the Appellate jurisdiction of the Court is exhausted insofar as the weight of the evidence is concerned.

All of the following cases involve actions under the Act, and amply illustrate this rule.

1. *Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 U. S. 29, at 35:

2. *Waddell* v. *Chicago E. I. Ry. Co.*, 142 Fed. (2d.) 309, at 309;

3. *Henwood Trustee of St. L. Southwestern Ry. Co.* v. *Chaney*, 156 Fed. 2d. 392, at 398;

4. *Grand Trunk Western Ry. Co.* v. *Heattie*, 48 Fed. 2d. 759, at 761;

5. *Chapman* v. *Alton Ry. Co.* (C. C. A. 7th Cir.), 117 Fed. 2d. 669, at 672;

6. *Ellis* v. *Union Pacific Ry.*, 329 U. S. 649, at 653;

7. *Lavender* v. *Kurn, Trustee of San Francisco Ry. Co., etc.*, 327 U. S. 645, at 652;

8. *Witherbee* v. *Elgin, Joliet & Eastern Ry. Co.*, (C. C. A. 7th C.), 191 Fed. 2d. 302, at 308;

9. *Stanczak* v. *Pa. Ry. Co.*, 174 Fed. 2d. 43, at 47;

10. *Stanford* v. *Pa. Ry. Co.*, 171 Fed. 2d. 632, at 634;

11. *Bolin* v. *Lehigh Valley Ry. Co.*, 167 Fed. 934;

12. *Boston & M. R. R. Co.* v. *Cabana*, 148 Fed. 2d. 150, at 153;

13. *Williams* v. *N. Y. C. R. R. Co.*, 84 N. E. 2d. 399, at 405-406;

14. *Nickell* v. *B. & O. Ry. Co.*, 106 N. E. 2d. 738, at 741, 347 Ill. App. 202 (4th Dist. of Ill.);

15. *Grosse* v. *Terminal R. R. Ass'n of St. Louis* (4th Dist. of Ill.), 307 Ill. App. 414, 29 N. E. 2d. 1018, at 1022.

In *Tennant* v. *Peoria & Pekin Union Railway Co.*, 321 U. S. 29, at page 35, this Court said:

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. *It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credi-*

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bility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & G. R. Co. v. McDade, 135 U. S. 554, 571, 572, 34 L. ed. 235, 241, 242, 10 S. Ct. 1044; Tiller v. Atlantic Coast Line R. Co., supra (318 U. S. 68, 87 L. ed. 618, 63 S. Ct. 444, 143 A. L. R. 967); Bailey v. Central Vermont R. Co., 319 U. S. 350, 353, 354, 87 L. ed. 1444, 1447, 1448, 63 S. Ct. 1062. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. *Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.*"

Again the Circuit Court of Appeals for the Seventh Circuit in *Waddell* v. *Chicago & E. I. R. Co.*, 142 Fed. 2d 309 at page 309, said:

"Defendant makes a rather convincing argument that plaintiff's injuries were not the result of any negligence on its part. It is an argument, however, which could more appropriately be made to the trier of the facts. Any doubt heretofore existing as to the limited scope of our authority on review has been dispelled by recent decision of the Supreme Court. *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; *Tennant* v. *Peoria & Pekin Ry. Co.*, 64 S. Ct. 409. *No good purpose could be served, therefore, in relating or discussing the testimony further than to ascertain if plaintiff's charge of negligence is supported by any substantial evidence when considered in the light most favorable to plaintiff and together with all inferences which may be reasonably drawn therefrom.*" (Emphasis ours.)

In *Henwood, Trustee of St. L. Southwestern Ry. Co.* v. *Chaney*, 156 Fed. 2d 392, at 398, the Court said:

"The appellant in its brief presents argument relating to *inconsistencies in the testimony of plaintiff's witnesses and to weight of evidence and credibility of witnesses. But the jury has passed on these questions and we are bound by its decision. Tennant, Adm'x,* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520." (Emphasis ours.)

In *Grand Trunk & W. Ry. Co.* v. *Heatlie*, 48 Fed. 2d 759, at 761, the Court said:

"*The contention that the verdicts are against the weight of the evidence cannot be considered* as this court can go no further than determine whether there is substantial evidence to support them." (Emphasis ours.)

In *Chapman* v. *Alton Ry. Co.*, 117 Fed. 2d 669, the Circuit Court of Appeals, the seventh Circuit, had occasion to pass on this precise question. At page 672 of its opinion the Court said:

"By assignment of error the plaintiff urges reversal on the ground *that the verdict of the jury was against the manifest weight of the evidence.* The duty of this court under this assignment is limited to ascertaining if there was any substantial evidence to support the jury's verdict. The credibility of the witnesses, the inferences to be drawn from proven facts, the weight to be accorded the various items of evidence were exclusively for the jury. The rule to be followed is too familiar to warrant extended discussion" (Citing authority). (Emphasis ours.)

In *Lavender* v. *Kurn, Trustee of San Francisco Railroad Co. etc.*, 327 U. S. 645, at page 652, the Court said:

"It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook

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to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. (Citing cases.) See also Moore, 'Recent Trends in Judicial Interpretation in Railroad Cases under the Federal Employers' Liability Act,' 29 Marquette L. Rev. 73.

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (Emphasis ours.)

In respect to the very Appellate Court who wrote the opinion in the case at bar, no Federal authority is cited for its holding, that it has the authority to hold this case against the manifest weight of the evidence.

It cites only the case of *Robertson* v. *Louisville & N. R. Ry. Co.*, 327 Ill. App. 44-63 N. E. 2d 608, a case which was decided by this same Court in 1945. This *Robertson* case has never been cited except by reference made to it in the case at bar.

The same Appellate Court which wrote the opinion in the case at bar, has previously held contrary to its present holding in other Federal Employer Cases decided by it. These cases correctly followed the federal rule.

First in *Grosse* v. *Terminal R. Ass'n. of St. L.*, 307 Ill. App. 414, 29 N. E. 2d 1018, at page 1022 of the Northeastern Reporter, the Court said:

"*The federal courts have held that the fact that the verdict and judgment are against the weight of the evidence are not for the determination of an appellate court.*" (Citing authority.) (Emphasis ours.)

Again, in *Nickell* v. *Baltimore & O. R. Co.*, 106 N. E. 2d 738, 347 App. 202, this same Court, which reversed the case at bar, with the writer of the opinion in the case at bar, concurring with another justice (one Justice dissenting), announced and followed the correct rule in this type of case, saying at page 741 of the Northeastern Reporter:

"Under the circumstances, questions of contributory negligence of defendant Railroad Company were questions of fact for determination by the jury, Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497; Tennant v. Peoria & P.U.R.R. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520; Williams v. New York Central R. R. Co., 402 Ill. 494, 84 N. E. 2d 399. We cannot say under the facts before us that the verdict of the jury was not supported by the evidence and a directed verdict, under the facts in the record, would have been improper. Wilkerson v. McCarthy, supra; Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916. Once an evidentiary basis has been established for

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the jury's verdict the Court is required to uphold such conclusion, even though such Court might draw contrary inferences or feel that another conclusion is more reasonable." (Emphasis ours.)

All the foregoing cases involve actions under either the Safety Appliance or Federal Employers Liability Act. They unequivocally hold that the Appellate Court's function in reviewing these cases is exhausted, once it has determined that a submissible case was presented. They specifically enjoin the weighing of the evidence in order to set aside a verdict, as was done in the present case. Counsel for respondent can cite no Federal Case arising under the Safety Appliance Act or Federal Employer's Liability Act where a Federal Court has held that the Appellate Court could weigh the evidence and reverse because the verdict was against the manifest weight of the evidence.

The opinion of the Court in the present case is squarely in opposition to the governing Federal law. The case is squarely within the category of cases requiring certiorari, that is where there is a conflict between the highest state Court (here the Supreme Court of Illinois who refused petitioner's leave to appeal) and the Federal Courts being both the various Circuit Court of Appeals and this Honorable Court as well.

No other reason should need to be adduced to warrant the granting of this writ. However, since it is apparent that even if the Court here had the authority to hold the verdict against the manifest weight of the evidence, (which is conceded only for argument) it acted erroneously in so doing.

First, it must be remembered that the Federal Courts including this Honorable Court have frequently reiterated in cases under the acts, that the Appellate Court cannot search the record to find some conflicting version of the incident, nor can it draw contrary inferences once an evidentiary basis has been established for the jury's verdict.

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; Tennant v. Peoria & Pekin Union Ry. Co., 321 U. S. 29 at 35—(quotations to this effect have been previously noted, and therefore are not repeated for the sake of brevity).

The Court held this action against the manifest weight of the evidence, on the assertion that the evidence regarding the defect in the retriever was such that if plaintiff's expert's testimony were taken as true the retriever would not operate normally, and that the evidence showed it did operate properly after the incident (R. 26).

This the Court held was irreconcilable and warranted a reversal.

In regard to the testimony regarding the expert witness further note will be made later.

Regarding the normal operation of the retriever after the incident the following was the evidence.

The sole basis for the Courts saying that the retriever "operated normally" after the incident, was the statement of Harsh after the incident—at page 75 of the Record, he said this, about the retriever: "It doesn't necessarily have to be set when you place it under the hook. *I presume he reset it.* I saw him pull it out."

The retriever was never brought into court or its subsequent disposition by the company ever accounted for (R. 25).

Plaintiff's statement, that the retriever was presumably reset and placed on the hook, was speculative, in so far as the presumption was concerned, and was in no way a positive statement that the retriever was operating normally. In fact, as we shall see when we analyze the testimony of petitioner's expert witness, the retriever could have been easily reset and still not have operated normally on every occasion.

None of the defendant's occurrence employees makes any statement about the fact that the retriever was reset, or that

it was in any way used on the return trip. Their statements were simply that it was under the hook. (See R. 119, 120, 125, 126, 130).

Nor do I believe this Court's construction of the statement of plaintiff's expert to the effect that the retriever would not operate normally at all is one that should necessarily follow.

This witness stated that in his opinion the defect causing the retriever's failure to operate properly was:

"My opinion is that the paw mechanism would be some fault in the paw mechanism. There would be several reasons why it would cause it not to work properly. The main reason would probably be where the teeth would probably be worn to a point where it would slip this dog out, which would cause it to retrieve. There are several small springs involved in this that would cause it to retrieve without any warning" (R. 84).

In view of this witness' testimony concerning the interworkings of the machinery of the retriever (R. 80 and 81), it is very conceivable, that where an interlock was made with an unworn gear tooth of the retriever, the latter would properly operate, whereas, if the retriever were to be wound where it was set with one of the gear teeth which was worn, the retriever would not work properly, and this was apparently the situation when plaintiff was injured.

The statement by this witness, that the retriever would not work normally at all was based on this final question: "* * * if the paw were worn and springs broken would it work normally at all?" (R. 85).

The witness' opinion as to the cause of the retriever's failure to work properly, as before noted, was based on several things that could have been wrong with the retriever, that is, that the paw mechanism was not working properly, or the teeth being worn caused slipping, or that there were several small springs involved that could cause

it to retrieve without warning. This witness did not specifically say which one of these caused the failure in the instant case, as he was in no position to know this, and defendant did not produce the retriever. His statement, that it would not work normally at all if both the paw and springs were broken, is probably correct, but does not pass upon the question whether it would work normally at all, if just one of these things were defective.

So we can see that the reasons adduced by the Court for holding the verdict against the manifest weight of the evidence will not stand circumspection.

The Court first reasons that because petitioner stated he presumed the retriever was reset it was "operating normally". This inference is certainly a presumed one under the evidence, and when the Court then attempts to parlay this, with the expert's alleged opinion, that this would be impossible, the Court's reasoning becomes untenable, for we have seen that the expert's testimony is not reasonably subject to such a construction.

We believe it is apparent that the Court, in the instant case, has erroneously weighed the evidence, if it should be found that it ever had such a right. This latter action, in itself, would be sufficient for this Court in the exercise of its supervisory powers to grant the Writ.

Wherefore, petitioner respectfully prays, that a Writ of Certiorari be issued out of this Honorable Court to review the judgment of the Supreme Court of Illinois in this cause, and for such other relief as to this Court may seem proper.

Dated May 29, 1954.

WAYNE HARSH,
Petitioner,

By MORRIS B. CHAPMAN,
Attorney for Petitioner.

AUG 27 1954
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 125.

WAYNE HARSH,
Petitioner,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois.

PETITIONER'S REPLY BRIEF.

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WAYNE HARSH,
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On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois.

PETITIONER'S REPLY BRIEF.

The Boiler Inspection Act, under which this action was brought, is a part of what is considered the "Safety Appliance Acts," and is to be construed as being in Pari Materia with the Federal Employers' Liability Act.

The Court in McCarthy v. Pa. Ry. Co., 156 F. 2d 877 at 879, noted this in regard to a violation of Section 23 of Chapter 45, U. S. C. A., in stating that the acts are in Pari Materia and must be construed together.

This is noted because respondent in its brief at page 2 would attempt to imply that a different situation exists.

Respondent states that the state law of practice and procedure governs an action under these acts, when such an action is instituted in a state court.

Under this contention it contends the appellate court had the power, despite the federal rule to the contrary, to apply the state statute [Paragraph 216 (3) (b) of Chapter 110 of Illinois Revised Statutes] granting such appellate court the right to hold a verdict against the manifest weight of the evidence.

In a state court, respondent contends, in actions under Federal Acts, the parties are bound by state rules of procedure and practice and this, despite Federal holdings to the contrary, or the fact, that the application of such practice or procedure (as in the case at bar) results in the deprivation of a litigant's rights granted him by such Federal Acts.

We think it is apparent without the citation of any authority that this could not conceivably be the law. Because if it were, this would permit each and every state forum to enact practice and procedure rules of a substantive nature contrary to federal law and practice and thereby deprive the Federal Courts of not only their right to control Federal statutory actions in state courts, but also permit chaos to reign in the multitude of state courts with their various conflicting procedures.

It has already been pointed out in the petition herein that under the acts in question the right to trial by jury is part and parcel of the acts and that appellate courts may not interfere, once they have determined that a case has been presented, with such jury's verdict, by holding same against the weight of the evidence or by substituting

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some theory of their own in lieu of that reached by the jury.

This right petitioner had in the Illinois State Forum, and this right has been denied him by virtue of a state procedural statute of a substantive nature which was applied to his action but which admittedly is contrary to the Federal law governing the same situation.

What then is the true rule concerning the application of state rules of practice and procedure in Federal statutory actions instituted in state courts?

The true rule seems to be that state rules of practice and procedure are only applicable to Federal statutory actions in state courts, when such rules do not deprive a litigant of a substantive right guaranteed by the Federal Statute or by its construction by Federal Courts.

This Court has recognized this rule in the case of Atlantic Coast Line Railroad v. Mims, 37 Sup. Ct. 188 at 190, and the Supreme Court of Illinois likewise is aware of it, although it failed to apply it in the instant case.

In Brant v. Chicago & Alton R. R. Co., 294 Ill. 606 at 616, the Supreme Court of Illinois in speaking of the Mims case, supra, said:

> "That court recognizes the doctrine that a substantive Federal right or defense duly asserted cannot be lessened or destroyed by a State rule of practice, • • •."

This Court has repeatedly held, not only by specifically denying an appellate court the right to hold a case against the manifest weight of the evidence where a submissible case is presented, as noted by the authorities in the petition but also that the question of the **kind** or **amount** of the evidence essential to recovery is a Federal and not a state question.

In Chicago, Milwaukee & St. Paul Railway Co. v. Coogan, 70 L. Ed. 1041 at 1044, 271 U. S. 473, this Court in speaking of the negligence required to prove a case under the act, said:

> "The **kind** or **amount** of evidence required to establish it is not subject to the control of the states."

Likewise this Court, the inferior Federal Courts, and various state courts, have repeatedly held that where there is a conflict between state and Federal authority in regard to law, procedure or practice as affecting substantive rights under the act, the Federal law prevails.

In the recent case of South Buffalo Ry. Co. v. Ahern, 344 U. S. 367, 97 L. Ed. 395, at page 401 of the Lawyers' Edition, this Court said:

> "We do not doubt that the Federal Employers' Liability Act, supplanting a patchwork of state legislation with a nationwide uniform system of liberal remedial rules, displaces any state law trenching on the province of the act. State Legislatures, for example, may not intrude into the federal act interstate commerce perimeter to destroy uniformity by arbitrarily presuming the renunciation of rights which the act confers, * * *."

In Buffo v. Baltimore & O. R. Co., 304 Pa. 437, 72 A. 2d 593, in speaking of an action under the act, the Supreme Court of Pennsylvania, at page 593, said:

> "But the interpretation of the act and its application to the facts of any particular case, in order to ascertain whether the plaintiff has been denied a right granted by Congress is ruled by the decision of the United States Supreme Court. (Citing authority.) Rights of recovery authorized by Federal law may not be defeated either by State law or practice. Davis, Director General of Railroads, etc., v. Wechsler, 263 U. S. 22, 24, 44 S. Ct. 13, 68 L. Ed. 143; Brown v. Western Railway of Alabama, supra."

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As was stated in Whitmarsh v. Pa. R. Co., 61 Federal Supp. 850, the question of proof necessary for judgment is a matter of substance and is governed by Federal law. The Court at page 852 said on this point:

> "Moreover, this requirement of uniformity extends to the **type of proof necessary for judgment** for this question of burden of proof is a matter of substance. New Orleans & Northeastern R. Co. v. Harris, 1918, 247 U. S. 367, 371, 38 S. Ct. 536, 62 L. Ed. 1167. See Garrett v. Moore-McCormack Co., 1942, 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 239." (Emphasis ours.)

In Davis v. Midland Valley Ry. Co., 153 Pac. 2d 823 (Okla.), the Oklahoma Court, in referring to an action under the act, at page 824 said:

> "It is well settled that when an action comes within the provisions of the Federal Employers' Liability Act, supra, it is governed thereby irrespective of **constitutional or statutory provisions to the contrary.** (Citing authority.)"

This Court in Dice v. Akron C. & Y. R. Co., 96 L. Ed. 398, 342 U. S. 359, at 361, very succinctly stated the evident reason behind these holdings, saying:

> "Manifestly the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were entitled to have the final say as to what defenses could and could not be interposed by suits under the act."

Respondent's counsel contends the Federal Rule and the State Rule of Illinois are the same and that in a federal court the reviewing court has the authority to hold a case against the manifest weight of the evidence. It cites several cases in which new trials have been granted in cases under the acts. **It cites no case in which a Federal Em-**

ployers' Liability or Safety Appliance Act case in the Federal Court resulted in a holding that a new trial should be awarded by reason of a verdict being against the manifest weight of the evidence. This in itself should be proof that no such power exists as the Federal Reports are rife with cases under the act.

True, in other types of cases, such liberty is allowed and respondent has cited some of these. In fact, at page 13, it cites the case of Charles v. Norfolk and Western Ry. Co., 188 F. 2nd 691, which by virtue of its title might be inferred to be an action under the act. However, upon reading this case it is found it involves an action by a negro passenger for assault and battery, etc., against the railway.

The correct rule in cases under the acts in question is noted in petitioner's brief. That is, that the right to a jury trial is part and parcel of the act, and to permit judges upon appeal to interfere with verdicts because they feel a different result should have been reached or that upon weighing the evidence a different determination should follow is a deprivation of this guarantee and should not be tolerated.

The Federal Court, in Henwood, Trustee of St. Louis Southwestern Ry. Co., v. Chaney, 156 Fed. 2nd 392, very concisely stated this doctrine in saying at 398:

> "The appellant in its brief presents argument relating to the testimony of plaintiff's witnesses and to **weight of evidence** and credibility of witnesses. But the jury has passed on these questions and we are bound by its decision. Tennant, Adm., v. Peoria & Pekin Union Ry. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520." (Emphasis ours.)

Respondent contends that petitioner, by striking out the order granting the new trial, acquiesced and assented

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to the procedural law of Illinois as applicable and thereby is estopped from denying its applicability. (See page 12 of respondent's brief.)

This is utterly naive; rather than acquiescence, petitioner's conduct was one of a denial of the appellate court's right to grant a new trial. Petitioner forced the appellate court to enter a final appealable judgment and thereby placed himself in a position to appeal ultimately to this court and to raise the questions here presented by his actions. This, rather than being an acquiescence, is an obvious denial of the appellate court's holding by any intelligent interpretation.

Of course, respondent would have been delighted if petitioner had acceded to the new trial order because this was tantamount, in the absence of additional evidence (and in view of the position taken by the Appellate Court of Illinois in construing the evidence before it, a rather considerable amount of additional evidence would have been required) to the termination of petitioner's action and would have resulted in a final victory for respondent.

The respondent makes no challenge as to the veracity of the facts noted in petitioner's petition in this cause whereby the appellate court held the case against the manifest weight of the evidence; nor does it attempt, in any way, to justify the court's action in the result it reached in so weighing the evidence. Under the applicable law as cited in petitioner's brief, this, of course, was impossible to do.

Rather (at pages 25 and 26 of its brief) respondent states this Court has no authority to review the findings of fact because the Supreme Court of Illinois had no authority to do so by virtue of its statutory limitation.

What has already been said about state rules of practice and procedure where they interfere with the federal law

governing federal statutory actions in state courts is equally applicable here and need not be repeated.

Further the question of whether an action is against the manifest weight of the evidence is one of law as derived from the facts.

Respondent cites no authority and we know of no limitation in cases of this type, whereby this court is estopped to examine the facts to determine whether a party has received a fair trial as guaranteed by federal law in a federal statutory action in a state court.

In conclusion it is interesting to note the confusion that exists in Illinois concerning the state courts' authority regarding the right to hold an action under the acts in question against the manifest weight of the evidence.

The case of Parthun v. Elgin, J. & E. Ry. Co., cited by respondent, and found at 325 Ill. A. 408, 60 N. E. 2d 464, clearly illustrates the erroneous view.

At page 467 and page 468 of the Northeastern Reporter, the Appellate Court of Illinois, for the First District, held that the action being one brought under the act in a state court, the parties were governed by the state rules of procedure concerning its authority to hold a case against the manifest weight of the evidence.

This Court concluded it had the authority to so do by virtue of the Illinois Statute permitting same (the same Statute relied upon by the appellate court in the case at bar) because the suit was brought in a state rather than a federal forum. However, the court there admitted that a different rule existed in the federal courts under the same situation because the suit was there governed by federal authority, saying in distinguishing the federal court cases at page 466 of the Northeastern Reporter:

> "In Tennant v. Pekin Union Railway Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520, relied upon by plain-

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tiff, suit was filed in a Federal District Court and the case is, therefore, not applicable."

In the Parthun case, the court at least had the intelligence to appreciate the fact that two different rules were being applied. This is a situation which respondent denies, although it cites this same language from the Parthun case at pages 10 and 11 of its brief, and one which the Appellate Court of Illinois, likewise, in the case at bar denied when it attempted to reconcile, in its additional opinion filed in petitioner's case, the holdings of the federal court and that of its own in the case at bar.

What the courts in the Parthun case failed to realize was, that state rules of procedure are not applicable where they affect substantive rights as has already been herein indicated.

Then we have in Illinois the correct view in this situation as enunciated in Nickell v. Baltimore & Ohio R. Co., 106 N. E. 2d 738, 347 App. 202, and in Grosse v. Terminal Ry. Ass'n of St. Louis, 307 Ill. App. 414, 29 N. E. 2d 1018, at 1022, wherein the Appellate Court of Illinois for the Fourth District held in cases under the acts, that the question of manifest weight of the evidence was not before the reviewing court under the controlling federal law. (See quotations from these cases at page 18 of petitioner's writ herein.)

One other case is interesting in this regard. This also cited by respondent (page 11 of its brief). This is the case of Mitchell v. L. & N. Ry. Co., 375 Ill. 545, 31 N. E. 2d 965, wherein the Supreme Court of Illinois reversed and remanded to the Appellate Court for the Fourth District of Illinois, an action under the act with general language to the effect that the Appellate Court could weigh the evidence.

However, when the Appellate Court received the case back and reviewed it after reversal (310 Ill. App. 563, 35 N. E. 2d 81), it didn't take the general language of the Supreme Court (which would ordinarily have been correct had not the case been under the Federal Employers' Act) literally, but rather applied the correct rule concerning its right to weigh the evidence and said, after conceding it was governed by the federal law in regard to the contention that the verdict was against the manifest weight of the evidence, at page 86 of the Northeastern Reporter:

> "The federal courts have held that the fact that the verdict and the judgment are against the weight of the evidence, are not for the determination of an appellate court." (Citing authority.)

This, the same Appellate Court which held it had such authority in the case at bar.

This hopeless inconsistency in Illinois decisions and the fact that in the instant case the Court followed the incorrect rule makes manifest the need for certiorari.

Not only is the writ warranted for these causes, but also because the Appellate Court here admittedly searched the record to hold adversely to petitioner. Respondent has not even attempted to answer this point, but only erroneously contends that this Court cannot review it.

Justice to petitioner and the need for uniformity in Federal statutory actions compels the issuance of a Writ of Certiorari in the case at bar.

Respectfully submitted,

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DEC 27 1954
HAROLD B. WILLEY,

BRIEF ON MERITS.
No. 125.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

WAYNE HARSH,
Petitioner,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY,
Respondent.

On Writ of Certiorari to the Supreme Court
of the State of Illinois.

BRIEF FOR THE PETITIONER.

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BRIEF ON MERITS.

No. 125.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

WAYNE HARSH,
Petitioner,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY,
Respondent.

On Writ of Certiorari to the Supreme Court
of the State of Illinois.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The opinion of the Appellate Court for the Fourth District of Illinois is found in 351 Ill. App. 304, 114 N. E. (2d) 901. Following the opinion of the said Appellate Court petitioner, pursuant to Rule 75 (2c) of the Civil Practice

Act of Illinois [Illinois Revised Statutes 1953, Chapter 110, Section 199 (2c)] struck the remanding portion of the Appellate Court's decision, thereby making same final and reviewable by leave to appeal to the Illinois Supreme Court (R. 68).

The Supreme Court of Illinois denied petitioner's leave to appeal (thereby making the judgment final by the highest Court of Illinois) without written opinion (R. 69).

JURISDICTION.

The judgment of the Supreme Court of Illinois was entered on March 10, 1954 (R. 69). The jurisdiction of this Court is invoked under 28 U. S. C. A., Para. 1257 (3). The petition was filed June 7, 1954, and was granted October 14, 1954.

This action was brought pursuant to Title 45, Section 23, same being a portion of what is commonly known as the "Safety Appliance Act," being a companion act to the Federal Employers' Liability Act. Plaintiff's complaint was instituted charging the defendant specifically with violating the foregoing section of the Code (R. 23). There is no issue as to the applicability of the act, and the Appellate Court of Illinois for the Fourth District decided this action conceding that it was governed by the provision of the Safety Appliance Act (R. 17).

THE STATUTE INVOLVED.

This suit was initiated under the provisions of the Safety Appliances and Equipment Act (U. S. C., Title 45, Secs. 1 through 50), which in conjunction with the Federal Employers' Liability Act (Title 45, U. S. C., Sec. 51 et seq.) will be hereinafter referred to as the act. There is no issue raised as to the act being applicable to the case at bar.

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Section 23 of this act, which is relative to this case, reads as follows:

> "Use of unsafe locomotives and appurtenances unlawful—Inspection and tests.—It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of this Act (§§ 22-29, 31-34 of this title) and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for (Feb. 17, 1911, c. 103, § 2, 36 Stat. 913; June 7, 1924, c. 355, § 2, 43 Stat. 659)."

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the State or Federal law governs the right of a State Appellate Court to set aside a jury's verdict in an action under the "Safety Appliance Act" (45 U. S. C. A., Secs. ..... et seq.), as being contrary to the manifest weight of the evidence?

2. Which prevails in the event of conflict, a state statute affecting substantive rights of litigants under the acts or the rules of law as announced by the federal courts?

3. Whether if one concedes the right of the State Appellate Court to weigh the evidence and to hold a case against the manifest weight of the evidence, it was warranted in doing so in the case at bar?

STATEMENT OF THE CASE.

On April 25, 1950, petitioner Harsh was a conductor on an interurban electric car operated by defendant between St. Louis, Missouri, and Alton, Illinois (R. 30). On the date in question he was working on a three-car train of defendant, which left Alton, Illinois, at 7:00 A. M. and arrived in the tunnel of defendant's depot in St. Louis about 7:50 A. M. (R. 30).

Upon arriving in the tunnel petitioner got off the car so as to set the switch and permit the train to go in on Track Three, the proper one for it (R. 31). While proceeding to cross the switch one of the two trolley poles which were supplying electricity to the cars jumped the wire, failing to proceed onto Track Three. One of petitioner's co-employees got off the car, pulled the pole down and placed it under the safety hook (R. 31).

As the train then proceeded on, the trolley pole on petitioner's car jumped the track and he got off of his car to reset the pole and was in a position between the first and second car (R. 31).

On each car near the center there is a retriever. It is situated about five and one-half feet from the level of the ground (R. 31). The retriever is attached by a rope to the trolley pole. When the trolley jumps the wire there is a sudden pulling out of this rope, which causes the retriever to operate and to wind the rope onto the retriever, thus lowering the trolley pole so that it will not strike across wires or interfere with the continued passage of the car. The specific interworkings of the retriever are detailed by petitioner's mechanical engineer (R. 48 through 52).

After the trolley has jumped the wire and the retriever has retrieved the trolley pole it is necessary to reset the retriever (R. 32). When the retriever has become wound

after a sufficient amount of winding, it locks and becomes set and the tension of the rope is gone and the rope can be played freely back and forth on the retriever (R. 32). After the retriever has been rewound it can be set again on the pole by a slow releasing of the rope and permitting a gradual ascension of the trolley pole to the line (R. 32). If the trolley were slowly permitted to ascend, then it is agreed that the retriever, if properly operating, should not retrieve (R. 49).

Petitioner on the instance in question first pulled out the rope to rewind the retriever (R. 32). While resetting the trolley pole, and while permitting the rope to be played out in a slow manner, because of a defect in the retriever, the retriever suddenly operated, pulled petitioner between the two cars, severely injuring petitioner's back (R. 32). Petitioner stated that when the retriever pulled him it was as if he had been struck by something, and it immediately occasioned a terrible pain down his head and back (R. 32).

Unable, because of his pain, to reset the retriever on the pole in question, petitioner set the pole on the car behind (R. 32).

This pole was setting the opposite direction for the then forward motion of the car, and the car was backed into the tunnel against the pole, a situation used only in case of emergency (R. 32).

Petitioner was corroborated by defendant's witness Elder regarding the fact that the retriever was pulled out by him and that rather than placing that trolley on the line, which was the normal thing to do, he hooked it on the hook and set the pole on the other car (R. 57-59).

Unable to aid in the discharge of his passengers as was his usual custom, Harsh rode dead-head back to Granite City with his crewmen (R. 33). While returning with the crewmen he told two of them of his injury (R. 33).

These employees testified for the Company at the trial and denied Harsh had told them about the injury.

Harsh stated his pain subsided somewhat, and that after he returned to the yards in Granite City, he went to his home (R. 33). He was too ill to eat his breakfast and lay in bed for a short while (R. 33). Having made previous arrangements to assist in a roofing job in Wood River, he drove to Wood River (R. 33). While at the home of his friend and co-employee, Phillips, he called his wife and directed her to report him off work because he felt ill (R. 33). He was to go back to work at 2:10 in the afternoon for the second part of his split shift (R. 33).

Returning home about two in the afternoon, he stated his back was hurting more and more as time went on (R. 34). That afternoon he reported to defendant's dispatcher, Quigley, that he was injured on the morning run and received a slip for the hospital and doctor (R. 35).

He went to Dr. Grzesk, whom he believed to be a company doctor. The doctor examined him, gave him a hypodermic, and sent him home to bed (R. 35).

He didn't return to work until the following Sunday, being in great pain during this period (R. 35).

When able, some three days after his injury, on April 28, 1950, he went to the defendant's office and made a report of his injury, which was placed in evidence as Petitioner's Exhibit I. This report corroborates petitioner's version of his injury precisely as he testified at the trial. He noted in this report that the retriever was defective and that its sudden retrieving had drawn him in over the drawbar and injured him.

Petitioner was referred by defendant to several other local doctors who examined him but did not testify in the case. He was finally ordered by Company Doctor Hamm on May 19, 1950, to Missouri Pacific Hospital (R. 36).

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He was admitted there as a service employee, with a service injury, and his admission was approved by the general superintendent of defendant company (R. 36). This was marked on his entry card (R. 36). He remained there until the 30th, being examined by various doctors but receiving little relief (R. 36).

He continued to treat with Dr. Grzesk of Granite City and was doing so until the time of the trial (R. 37).

During the intervening time, he has been wearing a canvas belt on his back for support and at times his pain would be alleviated, other times he was severely affected by pain and was unable to pick up or move things, even his baby. This was his condition at the time of the trial on September 19, 1951 (R. 37).

Petitioner testified to specific days of loss of work amounting to over $600.00 and in addition testified there were periodical times when he was unable to work (R. 37, 38). Although he had no complete record of his actual time lost, he also testified that he would sometimes go in the morning, work only two or three hours, and then have to be relieved because of his sickness and hurting (R. 42).

Paul Kline, a graduate mechanical engineer from Missouri School of Mines, employed at the time as a research engineer for American Steel Foundries, testified for petitioner (R. 48). On two occasions he had examined, and on one occasion disassembled, a retriever. The retriever in question was one belonging to defendant which petitioner had borrowed for the purpose of examination (R. 48). The defendant used only one type of retriever (R. 57). This retriever examined by Kline was shown to be the same type as was on the car when petitioner was injured (R. 38).

Kline described the interworkings of the retriever in detail and explained how it operated (R. 49). He specifically stated that if the retriever recoiled when there

was a slow letting out of the rope, that the retriever was defective and was not operating properly (R. 49, 51). This he explained could occur as a result of several possible defects in the retriever which would affect the operation of the paw mechanism (R. 52). These defects could be either from a wearing of the teeth at certain points which would cause slippage and result in unexpected retrieving or there could be defects in any of the several small springs which could cause the retriever to act without warning (R. 52).

Defendant's witness Elder, who weighed 190 pounds, admitted that the retriever when tripped pulled with such force as to pull him into the car before he could let go (R. 55).

Defendant's witnesses neither produced the retriever or accounted for its absence. Nor did defendant adduce any evidence concerning its condition at the time of the incident (R. 18).

The employees of defendants, who were crewmen on the car, testified, but they failed to witness the actual occurrence and their testimony was primarily directed towards denying that petitioner had informed them of the occurrence (R. 55 through 63).

The jury found in favor of petitioner and awarded him a verdict of Twelve Thousand Dollars ($12,000.00), and the trial Court, after denying defendant's motions for new trial and for judgment notwithstanding the verdict, entered judgment on the verdict in favor of petitioner (R. 15). Defendant appealed to the Appellate Court for the Fourth District.

The Appellate Court held that petitioner had made a jury question, but that the verdict of the jury was against the manifest weight of the evidence, and reversed and remanded the cause for a new trial (R. 15 through 21).

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On petitioner's petition for rehearing, setting up the fact that the Appellate Court was without authority, under the governing Federal rules of law, to hold the verdict against the manifest weight of evidence, the Court wrote an additional opinion specifically denying the petition and relied upon its "historical power to reverse and remand a case for new trial when it believes the verdict to be against the manifest weight of the evidence" for so doing (R. 21, 22).

Petitioner, then, pursuant to Rule 75 (2c) of the Illinois Civil Practice Act [Chapter 110, Section 199 (2c), Ill. Revised St. 1953], struck the new trial and remanding clause of the Appellate Court's judgment, thus making it final, and sought from the Supreme Court of Illinois the right of leave to appeal from such final judgment, again raising the question of the right of the Appellate Court, under the governing Federal authority, to hold petitioner's verdict to be against the manifest weight of the evidence (R. 1-15).

The Illinois Supreme Court denied petitioner's leave to appeal without opinion and petitioner sought certiorari to review the final judgment of the Supreme Court.

On October 14, 1954, this Court granted petitioner's request and ordered the writ granted (R. 69).

SUMMARY OF ARGUMENT.

The appellate court of Illinois exceeded its function o review when it, contrary to the controlling federal law weighed the evidence and substituted its opinion for tha of the jury in holding the present cause against the mani fest weight of the evidence.

Further the appellate court applied its own statutory state law granting it the right to weigh the evidence i preference to the law of the federal decisions which con trol and which forbade an appellate court exercising such a function once it had determined a submissible case existed. In the foregoing the lower court is guilty of transgressing its duty to apply federal law to federal statu tory actions in state courts and to permit its judgment to stand can only result in a voluminous mass of inconsistent holding in the various states without the determinative and supervisory restrictions of federal law.

This will result in many instances, as in the case at bar, in the deprivation of the employee's vested statutory right to trial by jury and will permit certain reactionary state courts to be just what they wish to be, the trier of the facts as well as the law.

Further, if the appellate court had a right to weigh the evidence and substitute its opinion for the jury's (a point conceded for the purpose of argument only) it erroneously assumed facts not shown by the record and made infer ences not properly deducible in order to deprive petitioner of his verdict. In other words, it searched the record in order to conclude differently from the result reached by the triers of fact and did this in contravention of the fed eral law which precludes this.

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ARGUMENT.

I.

In State Courts the Federal Holdings Are Controlling.

In actions under the Safety Appliance Act the holdings of the United States Courts are controlling and not those of the local courts of the various states.

Bailey v. Central Vermont Ry. Co., 319 U. S. 350, at 352;

Ellis v. Union Pacific Ry., 239 U. S. 649, at 653.

In Bailey v. Central Vermont Railway, 319 U. S. 350, this Court at page 352 said:

> "Section 1 of the Act makes the carrier liable in damages for any injuries or death resulting in whole or part from the negligence of any of its officers, agents or employees.
>
> "The rights which the Act creates are Federal rights protected by Federal rather than local rules of law (citing authorities)."

In Ellis v. Union Pacific Railroad, 329 U. S. 649, at page 653, in regard to the standard of negligence liability in cases under the Act, the Court said:

> "Whether those standards are satisfied is a Federal question, the rights created being Federal rights (citing authorities)."

II.

The State Court Had No Authority to Weigh the Evidence and Hold the Verdict to Be Against the Manifest Weight of the Evidence.

The first issue involved in the present case is whether the various state courts are at liberty to adjudicate in their

own way the rights of litigants under the Federal Employer and Safety Appliance cases in a manner contrary to the adjudication of such cases in a Federal Court.

Although Congress specifically permits the institution of cases under these acts in the state courts, it certainly cannot be inferred that it intended these courts adjudicate substantive rights under these federal statutes in a manner such as to prejudice litigants thereby.

Furthermore, to permit each state court to formulate its own rules and use its own substantive procedures in adjudicating these cases is simply to permit chaos to reign in the interpretation of the acts. This would inevitably result in not one pattern for these cases but for forty-nine, that is, one federal rule and one for each of the states.

In essence this is what the present decision will eventually develop if permitted to stand.

The Appellate Court of Illinois which decided the case at bar held this, in substance: Plaintiff had presented a submissible case for the jury on the question of defendant's negligence (R. 18); that the court's historical power to reverse a case as being against the manifest weight of the evidence [a statute, para. 216 (3b) of Chapter 110, Ill. Revised Statutes 1953, specifically grants the court such power]; that the court could thereby weigh the evidence and substitute its opinion for the jury's; that when it weighed the evidence and did substitute its opinion it felt the verdict for plaintiff was against the manifest weight of the evidence in regard to the defect alleged to exist; that it thereby could reverse and remand the cause.

The first question requiring determination is, was the Illinois court acting within its prerogative in its foregoing actions, keeping in mind the fact that on substantive matters, as we have seen, the Federal Court's construction of the acts is controlling?

It is petitioner's contention that it was not. This contention is based on logic as well as authority.

For, if a state court may set up its own standards for measuring the necessary evidence in order to recover in actions under the act, then the uniformity intended by Congress and the supervision vested in this Court over such situations is vapid.

The Federal Courts and most of the state courts in construing actions under the acts (when the word "acts" is used herein it contemplates the so-called Federal Employer and Safety Appliance Acts, Chapter 45, U. S. C. A. 1 et seq.) have appreciated that special consideration should be given to the legislative intent in enacting the statutes in question.

Railroad work is generally of a hazardous nature. Likelihood of injury to employees is greater than that of most employment. Congress certainly intended that some of the obstacles to recovery in common law actions should not be arbitrarily applied in these cases and hence the statutes and their provisions abolishing the harshness of the common law rule of fellow servant and contributory negligence as bars to recovery.

The Federal Courts and this Honorable Court have generally intelligently appreciated this situation and have strived to give affect to this known legislative intent.

Unfortunately state courts have failed in some instances to realize their position in the administration of these cases. They fail to discern that actually in handling actions under the acts they are sitting as federal courts and should be governed by federal rules of law construing these cases.

Although the specific injunctions of the act in forbading the application of the fellow servant and contributory negligence doctrines are too plain to warrant an attempt

to apply them in such cases, some courts nevertheless, and particularly so when the courts are reactionary and conservative, still attempt in other ways to invade the jury's province of deciding the factual issues. This they do under the guise of "against the manifest evidence" or by holding that there is an entire insufficiency of evidence to have warranted submission of the cause to the trier of facts.

In this manner they succeed in many instances in depriving employees of their just compensation.

In states where the courts are accustomed to a conservative approach in all cases it is much more difficult for them to give these cases the liberal construction intended.

This court is well aware of this existing situation and is no doubt much more familiar with it than the writer.

This court has repeatedly held that the right to trial by jury is "part and parcel of the acts" that to interfere with this is simply to deprive a litigant of his rights under them.

Here the appellate court of Illinois said that plaintiff had made a submissible jury case but that when it weighed the evidence, in its opinion, the jury's verdict was error, in that, the verdict was against the manifest weight of the evidence in regard to the existence of an alleged defect in the appliance in question (Rec. 18 through 21).

In weighing this evidence and in substituting its opinion for the jury's, the authorities hold the appellate court exceeded its function and thereby was in error.

In Tennant v. Peoria & Pekin Union Railway Co., 321 U. S. 29, at page 35, this Court said:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order

to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. **It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.** Washington & G. R. Co. v. McDade, 135 U. S. 554, 571, 572, 34 L. ed. 235, 241, 242, 10 S. Ct. 1044; Tiller v. Atlantic Coast Line R. Co., supra (318 U. S. 68, 87 L. ed. 618, 63 S. Ct. 444, 143 A. L. R. 967); Bailey v. Central Vermont R. Co., 319 U. S. 350, 353, 354, 87 L. ed. 1444, 1447, 1448, 63 S. Ct. 1062. **That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.**"

Likewise in Ellis v. Union Pacific Railroad, 329 U. S. 649, at page 653, the Court said:

"The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted facts, are questions for the jury. Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 88 L. ed. 520, 64 S. Ct. 409, 15 N. C. C. A. (N. S.) 647; Lavender v. Kurn, 327 U. S. 645, 90 L. ed. 916, 66 S. Ct. 740, supra. Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might

reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. Lavender v. Kurn, supra (327 U. S., p. 652, 90 L. ed. 922, 66 S. Ct. 740). And where, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury. Washington & G. R. Co. v. McDade, 135 U. S. 554, 572, 34 L. ed. 235, 241, 10 S. Ct. 1044; Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 68, 87 L. ed. 610, 618, 63 S. Ct. 444, 143 A. L. R. 967.

"We think the evidence raised substantial questions for the jury to determine and that there was a reasonable basis for the verdict which it returned.

"Reversed."

Also in Lavender v. Kurn, Trustee of St. Louis-San Francisco Railroad Co. etc., 327 U. S. 645, at page 652, the Court said:

> **"And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."** (Emphasis ours.)

Many lesser federal and state courts have repeated this rule and in instances specifically denied the reviewing court the right to hold a case against the manifest weight of the evidence.

The case of Henwood, Trustee of St. L. Southwestern Ry. Co. v. Chaney, 156 Fed. 2d 392, at 398, the Court said:

> "The appellant in its brief presents argument relating to **inconsistencies in the testimony of plaintiff's witnesses and to weight of evidence and credibility of witnesses. But the jury has passed on these questions and we are bound by its decision.** Tennant, Adm'x v.

Peoria & Pekin Union R. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520." (Emphasis ours.)

In this regard the cases of Grand Trunk & W. Ry. Co. v. Heatlie, 48 Fed. 2d 759, at 761, and Chapman v. Alton Ry. Co., 117 Fed. 2d 669, at 672, are also in point.

Likewise, in more lucid perspective, the very Court which decided the case at bar has followed this rule, although it refused to do so in the instant case.

In Grosse v. Terminal R. Ass'n of St. Louis, 307 Ill. App. 414, 29 N. E. 2d 1018, wherein at page 1022 of the Northeastern Reporter this very Court said:

> **"The federal courts have held that the fact that the verdict and judgment are against the weight of the evidence are not for the determination of an appellate court."** (Citing authority.) (Emphasis ours.)

This was also the holding in another case by this same Court in Nickell v. Baltimore & O. R. Co., 106 N. E. 2d 738, at 741, 347 Ill. App. 202.

In deciding contrary to this rule it had previously recognized, the Appellate Court in the case at bar cited only one case, that of Robertson v. L. & N. R. Ry. Co., 327 Ill. App. 44, 63 N. E. 2d 608, as its sole authority for so holding. This case had been decided earlier by this same Court. No Federal authority was given in the original decision nor in the supplemental opinion filed in denying the petitioner's petition for rehearing (R. 18-21-22).

The Appellate Court failed here to discharge its duty to follow the federal law governing this cause and for this reason and the further reason that uniformity is required this Court should reverse this cause.

III.

Where a Conflict Exists Between the State Law and the Federal Law the Latter Prevails.

No justification can be found in the Appellate Court's reasoning that because the statutory procedural law of Illinois permits it to weigh the evidence on review, this statute [para. 216 (3) (b), Chapt. 110, Illinois Revised Statutes 1953] is controlling in cases under the act and is superior to federal case law.

Although the state statute in question may be procedural in form and aspect, actually it is substantive in effect and as such cannot prevail over the law of the federal courts construing the acts.

In the case of Atlantic Coast Lines, etc., v. Mims, 37 Sup. Ct. 188, at 190, this Court recognized this rule.

In Chicago, Milwaukee & St. Paul Railway Co. v. Coogan, 70 L. Ed. 1041, at 1044, 271 U. S. 473, this Court in speaking of the negligence required to prove a case under the act said:

> "The **kind** or **amount** of evidence required to establish it is not subject to the control of the states."

Again in South Buffalo Ry. Co. v. Ahern, 344 U. S. 367, 97 L. Ed. 395, at page 401 of the Lawyers' Edition, this Court said:

> "We do not doubt that the Federal Employers' Liability Act, supplanting a patchwork of state legislation with a nationwide uniform system of liberal remedial rules, displaces any state law trenching on the province of the act. State Legislatures, for example, may not intrude into the federal act interstate commerce perimeter to destroy uniformity by arbitrarily presuming the renunciation of rights which the act confers."

Other holdings of a like nature are found in Buffo v. Baltimore & O. R. Co., 304 Pa. 437, 72 A. 2d 593, at 593; Whitmarsh v. Pa. R. Co., 61 Federal Supp. 850, at 852; Davis v. Midland Valley Ry. Co., 153 Pac. 2d 823, at 824.

This Court in Dice v. Akron C. & Y. R. Co., 96 L. Ed. 398, 342 U. S. 359, at 361, very succinctly stated the evident reason behind these holdings, saying:

> "Manifestly the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were entitled to have the final say as to what defenses could and could not be interposed by suits under the act."

The Appellate Court here failed to recognize this rule, rather it used its own state rule to deprive petitioner of his sacred right to a jury determination of the admitted factual issues.

To permit the decision to stand would be a repudiation of all the former holdings of this Court to the effect that federal standards and rules of law apply. It could serve only to add emphasis and support to the pseudo contention and desire of reactionary state courts to be the trier of the facts as well as the law. To permit this condition to result is to truly deprive the work of the most substantial remedy afforded by the act, that is the right to trial by jury. Whether or not one agrees that jury trial is the proper mode or procedure or would prefer some administrative bureau should handle these cases is not here the concern. Congress has specified the present system and until changed by it the courts have no discretion but to follow the congressional enactment.

This Court has many times appreciated this circumstance and its difficulty has been in securing proper cooperation from the state courts in this regard.

The supervisory capacity of this Court in cases instituted under federal statutes in state courts requires a constant circumspection of the rights afforded litigants in such courts. When, as here, these federal rights are not protected it is the duty of this Court to rectify the error by reversing such state court. Only in this fashion can any clarity of law result, and only in this latter event can a litigant in Texas receive the same trial and adjudication that one in West Virginia receives in state court actions involving federal rights.

The foregoing reasons provide ample logic and authority for this Court's reversing the present judgment.

IV.

The Appellate Court Searched the Record in Order to Find a Conflict and Thereby Substituted Its Opinion for That of the Trier of Facts.

However, since it is apparent that even if the Court here had the authority to weigh the evidence and to hold the verdict against the manifest weight of the evidence (which is conceded only for argument), it acted erroneously in so doing.

First, it must be remembered that the Federal Courts including this Honorable Court have frequently reiterated, in cases under the acts, that the Appellate Court cannot search the record to find some conflicting version of the incident, nor can it draw contrary inferences once an evidentiary basis has been established for the jury's verdict. Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; Tennant v. Peoria & Pekin Union Ry. Co., 321 U. S. 29, at 35—(quotations to this effect have been previously noted, and therefore are not repeated, for the sake of brevity).

The Court held this action against the manifest weight of the evidence, on the assertion that the evidence regard-

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ing the defect in the retriever was such that if plaintiff's expert's testimony were taken as true the retriever would not operate normally, and that the evidence showed it did operate properly after the incident (R. 18).

This the Court held was irreconcilable and warranted a reversal.

In regard to the testimony regarding the expert witness, further note will be made later.

Regarding the normal operation of the retriever after the incident, the following was the evidence:

The sole basis for the Court's saying that the retriever "operated normally" after the incident was the statement of Harsh after the incident—at page 44 of the Record, he said this, about the retriever: "It doesn't necessarily have to be set when you place it under the hook. **I presume he reset it.** I saw him pull it out."

The retriever was never brought into court or its subsequent disposition by the company ever accounted for (R. 18). Nor did it offer any evidence as to its operating condition at the time of the incident (R. 18).

Plaintiff's statement, that the retriever was presumably reset and placed on the hook, was speculative, in so far as the presumption was concerned, and was in no way a positive statement that the retriever was operating normally. In fact, as we shall see when we analyze the testimony of petitioner's expert witness, the retriever could have been easily reset and still not have operated normally on every occasion.

None of the defendant's occurrence employees makes any statement about the fact that the retriever was reset, or that it was in any way used on the return trip. Their statements were simply that it was under the hook. (See R. 56, 60, 62.)

Nor do I believe this Court's construction of the statement of plaintiff's expert to the effect that the retriever would not operate normally at all is one that should necessarily follow.

This witness stated that in his opinion the defect causing the retriever's failure to operate properly was:

> "My opinion is that the paw mechanism would be some fault in the paw mechanism. **There would be several reasons why it would cause it not to work properly.** The main reason would probably be where the teeth would probably be worn to a point where it would slip this dog out, which would cause it to retrieve. There are several small springs involved in this that would cause it to retrieve without any warning" (R. 52).

In view of this witness' testimony concerning the interworkings of the machinery of the retriever (R. 49), it is very conceivable that, where an interlock was made with an unworn gear tooth of the retriever, the latter would properly operate, whereas, if the retriever were to be wound where it was set with one of the gear teeth which was worn, the retriever would not work properly, and this was apparently the situation when plaintiff was injured.

The statement by this witness, that the retriever would not work normally at all, was based on this final question on cross-examination which assumed that not just one but all the defects mentioned were present in the retriever: "' ' ' if the paw were worn and springs broken, would it work normally at all?" (R. 82.)

The witness' opinion as to the cause of the retriever's failure to work properly, as before noted, was based on several things that could have been wrong with the retriever, that is, that the paw mechanism was not working properly, or the teeth being worn caused slipping, or that

there were several small springs involved that could cause it to retrieve without warning. This witness did not specifically say which one of these caused the failure in the instant case, as he was in no position to know this, and defendant did not produce the retriever. His statement, that it would not work normally at all if both the paw and springs were broken, is probably correct, but does not pass upon the question whether it would work normally at all, if just one of these things were defective.

So we can see that the reasons adduced by the Court for holding the verdict against the manifest weight of the evidence will not stand circumspection.

The Court first reasons that because petitioner stated he presumed the retriever was reset it was "operating normally." This inference is certainly a presumed one under the evidence, and when the Court then attempts to parlay this, with the expert's alleged opinion, that this would be impossible, the Court's reasoning becomes untenable, for we have seen that the expert's testimony is not reasonably subject to such a construction.

We believe it is apparent that the Court, in the instant case, has erroneously weighed the evidence, if it should be found that it ever had such a right. This latter action, in itself, would be sufficient for this Court in the exercise of its supervisory powers to reverse this cause.

CONCLUSION.

Wherefore, petitioner respectfully prays that the judgment of the Supreme Court of Illinois be reversed, and for such other relief as to this Court may seem proper.

WAYNE HARSH,
Petitioner.

By MORRIS B. CHAPMAN,
Attorney for Petitioner.

REPLY BRIEF.

No. 125.

FEB 7 1955
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

WAYNE HARSH,
Petitioner,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY,
Respondent.

On Writ of Certiorari to the Supreme Court
of the State of Illinois.

PETITIONER'S REPLY BRIEF.

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REPLY BRIEF.

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ILLINOIS TERMINAL RAILROAD COMPANY,
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On Writ of Certiorari to the Supreme Court
of the State of Illinois.

PETITIONER'S REPLY BRIEF.

No attempt will be made to analyze and differentiate each of the numerous decisions contained in respondent's brief. There are 116 cases cited in this garbled maze of unrelated data submitted under the guise of a "brief."

Most of these cases as will be noted have no bearing on the question involved.

If this matter is as simple as respondent contends, then it is difficult to comprehend why a brief of 67 pages and the citation of 116 cases should be necessary.

At no place in its brief has counsel intelligently discussed the question of whether the Appellate Court in this instance was in error when it weighed the evidence and substituted its opinion for that of the jury.

At no point has it, nor can it successfully argue that the State of Illinois in the operation of its judicial system can deprive the litigant in its courts in actions under Federal Statutes of the right to an adjudication of his case in accord with the interpretations of this Court.

At no point does it attempt to refute that where state procedural statutes deprive a litigant of his rights to an adjudication of his case by federal standards, such statutes must yield.

No, none of these points are intelligently discussed nor is any refutation or analyzation of the authorities cited in petitioner's brief attempted.

Rather we are treated to a classical discussion of general Illinois and Federal procedure concerning the granting of new trial, the directing of verdicts and of judgments notwithstanding the verdict. The conclusion of respondent's counsel then being that the rule in such cases in both jurisdictions is the same.

This might conceivably have some bearing, if it were shown, that in Federal Employer & Safety Appliance Act cases, the rule was the same.

However, counsel studiously avoids reference to these cases and only briefly attempts to refute those controlling cases cited by petitioner in his brief.

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Actually in cases under the acts in question, no true Illinois rule can be determined as will be later noted.

The Federal rule is, of course, that laid down by this Court in its various decisions referred to in petitioner's brief herein.

If respondent would only understand that we are here dealing with a simple question, that is, the right of a litigant relying on a federal statute in a state court, then all the generalities relied upon by respondent would disappear. These are no doubt the result of either a miscomprehension of the question or a realization that to face the real issue would be ruinous to its cause.

In respondent's statement of the case, it characterizes certain statements made in petitioner's brief as being "wholly untrue" and "to create the false impression" (pages 14 and 15). This ill becomes counsel. One would think out of graciousness to a fellow attorney, counsel might at least have conceded a mistake might have occurred.

In regard to witness Elder's statement, counsel for petitioner was in error for it was respondent's witness Green rather than Elder who weighed 190 pounds and who stated he had experienced occasions when the retriever had tripped (Record page 61).

Counsel apologized for this error but would also point out that respondent's statement that Elder's testimony was "wholly untrue" (Respondent's Brief page 14) is likewise in error.

At page 58 of the Record, it is shown that Elder was asked about a previous question and answer made at the time of his deposition as follows:

"Q. Now you mentioned that you had experience with a trolley retriever when you had already pulled the retriever out or pulled the rope out of the retriever for the purpose of setting it, and then having it rewind on you, has that happened during the course of your time?

A. Yes, sir, they trip on you most any time."

In regard to the statement at page 15 of respondent's brief that petitioner created a "false impression" about the irregularity of backing the car in against the pole, respondent is mistaken. Respondent's own witness, Cecil Campbell (Record page 62) said in regard to the matter of backing the car in as follows:

"I don't remember the car I was on. I don't remember anything particular that morning other than Mr. Elder made the statement when I got in the car with reference to the effect that they had to back it in against the pole. That was not the normal manner of doing it."

The most pertinent consideration about the facts in this case is that although respondent had endeavored all along to contend that the retriever was not defective, it failed in any way to produce it or in any way to account for its whereabouts.

It knew Harsh was injured by this retriever on this car but it never offered an iota of evidence regarding the operation of the retriever or any evidence as to what became of it afterwards. Even the Appellate Court conceded this (Record, page 18).

The fact that the company was in the habit of furnishing defective retrievers, and that other employees suffered similar incidents with them, although happily without the serious injury herein involved, in no way alters respondent's liability but rather aggravates the situation.

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Counsel next contends the case fails to present a substantial Federal question.

It bases this contention mainly on the fact that this Court dismissed the case of Corcoran v. City of Chicago (311 U. S. 610, 373 Ill. 567).

From a procedural point the Corcoran case parallels the case at bar. But it is only in this respect that any analogy exists.

In the Corcoran case (311 U. S. 610, 373 Ill. 567), no federal right of action was in any wise asserted.

That case involved a suit against the City of Chicago for personal injuries caused by an alleged negligent condition of the streets within the City.

No Federal statute was in any way pled or relied upon. No cause of action in any way relating to a Federal statute was determined in that cause.

Counsel's argument that petitioner is precluded by the holding in that case completely overlooks the facts and circumstances in the case at bar. That is, this is a case under the Federal Safety Appliance Act over which this Court has not only the right but the duty to see that litigants in state courts are protected.

The jurisdiction of this Court in the present action is under 28 U. S. C. A., par. 1257 (3), because here petitioner relies upon a federal statute as the only basis for his recovery.

THE WRIT ISSUED TO THE PROPER COURT.

Respondent's contention that the writ in this cause erroneously issued to the Supreme Court of Illinois, rather than to the Appellate Court for the Fourth District is equally without merit.

First, this Court granted the Writ on the status of the original record then before it which contained the whole of the judicial proceeding in this cause prior to its coming to this Court. As will be later noted, the Court, under the status of that original record, could only have properly issued the writ to the Supreme Court of Illinois, as it did do.

Under the rules of this Court, respondent, at the time it filed its brief in opposition to the Writ, could have noted any objection it had to the jurisdiction of this Court to grant the Writ as requested.

This is specifically provided for by Rule 24 of this Court, which provides in part as follows:

> (Rule 24) 2. "No motion by a respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the Court to grant writs of certiorari may be included in briefs in opposition to petitions therefor."

Granted, the word used is "may", and this not being mandatory, it could be argued that this rule does not intend to preclude the raising of the question at the time of filing a brief on the merits.

However, assuming that this is the intent, and knowing that the general law is, that a question of jurisdiction cannot ordinarily be waived, how does this avail respondent in presently urging the question?

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Under this court's rules and the present state of the record, not one iota, for the following reasons:

Rule 26 of this Court provides as follows:

"26. Designation of portions of the record to be printed.—1. Within twenty days after the court has entered an order granting a writ of certiorari, the petitioner shall file with the clerk a designation of the parts of the record the printing of which he thinks necessary for a consideration of the questions presented as set forth in his petition for writ of certiorari, or a designation of those parts the printing of which is considered unnecessary, whichever is more convenient, with proof of service on the respondent as prescribed by Rule 33. Insofar as any portion of the record has already been printed for the use of the court below, the designation shall so state, and shall indicate the number of printed copies of such portions that have been or can be furnished.

"2. Any respondent, within ten days after receipt of the designation filed by the petitioner, may file with the clerk a cross-designation of additional parts of the record the printing of which he deems material; and, if he shall not do so, he shall be held to have consented to a hearing on a printed record consisting of the parts designated by the petitioner. The parts of the record so designated by one or both of the parties, and only those parts, shall be printed by the clerk. The designations of the parts of the record to be printed will not be printed by the clerk with the record.

"3. Within the time allowed for filing a cross-designation, the parties may stipulate the parts of the record to be printed, whereupon only the parts so stipulated shall be printed by the clerk. If the designation in such stipulation shall differ from the desig-

nation already filed by the petitioner pursuant to paragraph 1 of this rule, then the designation in the stipulation shall prevail. The parties may also stipulate the inclusion in the printed record in this court of additional certified portions of the record below. The stipulations will not be printed as a part of the record.

"4. Rule 36 governs the printing and distribution of records.

"5. A motion to require the certification of additional parts of the record must be filed and served together with, and within the time allowed for filing, the cross-designation provided for in paragraph 2 of this rule. The clerk will not proceed under Rule 36 until the court has disposed of the motion.

"27. Stay pending review on certiorari.—Applications pursuant to 28 U. S. C. [F. C. A.] § 2101 (f) to a justice of this court will normally not be entertained unless application for a stay has first been made to a judge of the court rendering the decision sought to be reviewed, or to such court, or unless the security offered below has been disapproved by such judge or court. All such applications are governed by Rules 50 and 51."

The purpose of this rule is evident. It seeks to alleviate this Court's being burdened with the whole bulk of the record after the writ has been granted, many parts thereof then not being pertinent to the questions specifically presented in the petition. Likewise, it is intended to curtail the unnecessary expense of printing portions of the record upon which neither party intends to rely in the later presentation of the case.

It will be noted that under Paragraph 1 of Rule 26, counsel for petitioner must designate to the Clerk the portions of the record for printing.

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"he thinks necessary for a consideration of the questions presented as set forth in his petition for writ of certiorari, or a designation of those parts, the printing of which is considered unnecessary, whichever is more convenient".

Counsel for petitioner in his petition for certiorari set forth only two questions, as follows: (See page 2 of the petition for the writ filed herein by petitioner.)

"Questions Presented for Review.

"1. Whether the state or Federal law governs the right of a state Appellate Court to set aside a jury's verdict, in an action under the 'Safety Appliance Act' (45 U. S. C. A., Secs. . . ., et seq.), as being contrary to the manifest weight of the evidence.

"2. Whether the Appellate Court was correct in holding that petitioner's evidence concerning the defect in the car in question was against the manifest weight of the evidence."

In compliance with the rules, counsel for petitioner designated that the portions of the record bearing on these two questions be printed. This was done and there is no argument made by respondent that the record does not properly show that everything necessary for the Court to consider these questions was so designated and printed. Petitioner has duly complied with the rules in this respect.

Thereupon, what was then the duty of respondent?

Paragraph 2 of Rule 26 specifically denotes its duty. That is,

"any respondent within ten days after receipt of the designation filed by the petitioner, may file with the clerk a cross designation of **additional parts of the record the printing of which he deems material.**" (Emphasis ours.)

In this instance respondent did ask for some additional portion of the record, but not for any portion thereof which would indicate to what court this writ should have issued, as will be hereafter noted.

As has been stated, Paragraph 2 of Rule 26 requires that the respondent may designate such additional part of the record as "he deems material."

What respondent deems material would, of course, be based on the points it wished to make in opposition to the writ. It failed in its original brief, in opposition to the writ, to, in any way, indicate that the question of the jurisdiction of this Court to issue the writ to the Supreme Court of Illinois would be in any wise questioned.

Petitioner has no reason to anticipate it would now do so. Respondent, and respondent alone, knew upon what it intended to rely and under the clear intent of the rules had the option, and in this instance, in view of its present contention, the duty to designate the portions of the record bearing upon the question of jurisdiction be printed for the examination of this Court.

Keep in mind it is not petitioner's contention that there has been a waiver of a jurisdictional question. Certainly, if one raising a jurisdictional question can point out in the record such a defect, then he should be able to do so at any stage of the proceeding.

However, in the present situation it is urged that counsel is estopped by its failure to present the record on this question, as required by the clear intent of the applicable rules.

The dilemma of counsel in this respect is aptly illustrated by its brief.

It states blandly that the writ here should have issued to the Appellate Court, because this Court has held (and,

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of course, it could only hold in these cases under the exact status of the record as presented therein) in other cases that the writ there was properly directed to the Appellate rather than the Supreme Court.

Here again, respondent is in conflict with the rules as a necessary result of its own error. It is certainly the intent of Rule 40 that where facts are suggested, or some question regarding the record is discussed, reference should be made to the appropriate pages of the record pertaining thereto.

Here, in its argument on this question of jurisdiction, at pages 25 through 28 of its brief, no reference is made to any portion of the record. Of course, respondent is unable to make such reference, because it failed to furnish, as required, the portions of the record pertaining thereto (these omitted portions for illustration will be later referred to).

Not only did counsel fail originally to designate the portions of the record upon which it now relies, but it failed in any way to secure a stipulation or to file a motion that additional parts of the record be agreed or certified, as it could have done under Paragraphs 3 and 5 of Rule 26 of this Court.

It may be, although petitioner of course would not be in a position to say, that respondent waited in raising this jurisdictional question through a misunderstanding of the Rules, and thought that if certain portions of the record were omitted, it could then raise such a question with impunity.

If such is the case, it is unfortunate, but on the whole it must be conceded that if respondent had such motives (and petitioner does not necessarily say it did) justice has resulted.

If the respondent's error resulted from a misunderstanding of the Rules or through inadvertence, then, of course, this is truly unfortunate, but as will be seen, had it printed the record on this point, as required of it, there would have been no merit in its contention.

To illustrate the disadvantage to which petitioner is placed by reason of respondent's failure to comply with the rules in this respect, brief reference will be made to the original record in this cause, which this Court had before it at the time of the granting of the writ.

An order of the Supreme Court of Illinois, which clearly distinguishes the status of this case from these cases referred to by respondent in its brief, will also be noted, because petitioner is certain that this Court, when it granted the writ, took cognizance of the peculiar status of record of this cause, as affected by this order, and properly issued the writ to the Supreme Court of Illinois, rather than to the Appellate Court, where respondent contends it should have issued.

Before doing this it might be well to note certain provisions of Illinois procedure involved in this cause, so the course of the judicial development of this case can be completely understood.

Rule 16 of the Appellate Court for the Fourth District of Illinois provides for a stay of the mandate of that Court until the Supreme Court determines the petition for leave to appeal upon the filing of an affidavit, indicating that a party intends to file a petition for leave to appeal within the time provided by law.

This procedure was followed in the instant case (See page 151 of the original Transcript of the Record filed with the Petition for Certiorari).

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Upon the filing of the Petition for Leave to Appeal in the Supreme Court, the original Record and the Appellate Court Record in the cause went to the Supreme Court. (See Paragraph 259.32, Chapter 110, Ill. Rev. Statutes.)

Where the Supreme Court of Illinois denied the Petition for Leave to Appeal, as it did in the instant case, the record and mandate of that Court, denying the petition, would have been returned to the Appellate Court for the Fourth District as a matter of course (as provided in Paragraph 259.32 of Chapter 110, Ill. Rev. Statutes) had not petitioner herein adopted a different procedure.

Had this situation occurred, then respondent would have been correct in its contention that the writ should properly have issued to the Appellate Court for the Fourth District.

However, in the instant case, petitioner obviated this situation by also staying the mandate of the Supreme Court of Illinois until this petition for a writ of certiorari was determined by this Court.

At pages 155 and 156 (of the Original Transcript of the Record filed herein) this clearly appears in the following order entered in the Supreme Court of Illinois:

"In the Supreme Court of Illinois.

No. 33132.

Wayne Harsh, Plaintiff-Appellee,

vs.

Illinois Terminal Railroad Company, a Corporation, Defendant-Appellant.

Order.

This cause coming on to be heard upon the petition and affidavit of plaintiff-appellee, and it appearing to

the undersigned Judge of the Supreme Court of Illinois in vacation that due notice of said motion has been given to the defendant-appellant, and the Court being fully advised in the premises and having approved a bond in the sum of $500.00 conditioned to pay any costs or damages sustained by defendant-appellant by virtue of this Order; it is, therefore, ordered, adjudged and decreed that the mandate of this Court be and hereby is stayed for the statutory period or such extension thereto as may be granted by the Supreme Court of the United States during which plaintiff-appellee may seek a writ of certiorari in said Supreme Court of the United States, and that said mandate be further stayed in the event of the granting of said writ to plaintiff-appellee until said cause shall have been duly adjudicated by said Supreme Court of the United States.

Enter: Ralph L. Maxwell, One of the Justices of the Supreme Court of Illinois."

Under Illinois procedure the filing of the mandate in the lower Court is a precedent to reinvesting that Court with jurisdiction (See Smith v. Stevens, 133 Ill. 183 at 187).

In the case at bar, both the mandate and the record in this cause remained in the Supreme Court of Illinois by virtue of its own order.

The Supreme Court specifically, with knowledge that a petition for certiorari was to be filed, elected to await the decision of this Court upon that petition before its mandate issued.

Under such a circumstance the Writ not only should, but must lie to the Supreme Court of Illinois.

The cases of Minneapolis, etc., Ry. Co. v. Rock, 279 U. S. 410, 73 L. ed. 766; Lilly v. Grand Trunk W. Ry. Co.,

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317 U. S. 481, 87 L. ed. 411; Chicago & N. W. Ry. Co. v. Margevich, 75 S. Ct. 84, 99 L. ed. (Adv. Sheet No. 1), p. 46; Emmick v. Baltimore & O. R. Co., 340 U. S. 831, 95 L. ed. 611; Killian v. Pennsylvania R. Co., 338 U. S. 819, 94 L. ed. 497; Cowher v. Pennsylvania R. Co., 338 U. S. 828, 94 L. ed. 503; Thomson v. Sevier, 317 U. S. 698, 87 L. ed. 558, and Helton v. Thomson, 316 U. S. 688, 86 L. ed. 1760, cited by respondent are not helpful or controlling in view of the status of this record as indicated. Only the Lilly and Rock cases actually involve actions where this Court allowed a certiorari to review a similar action. In neither the Lilly or Rock cases was there a stay of the mandate in the Supreme Court and the situation therefore differs.

In the remainder of the cases above cited, all the decisions of this Court indicate that the petitions there seeking certiorari to the lower Appellate Courts were denied.

Nor do any of the cases arising from other states relied upon by respondent govern the present case, because in none of those cases was it shown that the higher Court had stayed its mandate and awaited the holding of this Court.

This Court has repeatedly held that the Writ should issue to the Court having jurisdiction and where the record of the cause is found.

Of course, if the mandate of the higher Court has issued and the record and mandate have been returned to the lower Court, then the writ would properly issue to that Court.

This Court, in Hodges v. Snyder, 261 U. S. 600, passed upon this precise question and there definitely stated the writ would properly issue to the Court where the mandate had issued and record was found, saying at page 601:

"The defendants in error move to dismiss the writ of error or affirm the judgment.

The ground of the motion to dismiss is that there is want of jurisdiction because the writ is not directed to the supreme court of the state. It was sued out to review a final judgment of that court, reversing, on appeal, an order of the circuit court, and remanding the cause, with direction to vacate the same. Under the local practice the original papers, that had been transmitted to the Supreme Court as the record on the appeal, were remitted to the Circuit Court, with copies of the judgment and opinion of the Supreme Court (S. D. Rev. Code, 1919, Sec. 3170); no copy of such record being retained by the Supreme Court. The rule of practice has been long established that in such case, in order to bring up the record, which is essential to a review of the judgment of the Appellate Court, the writ of error is properly directed to the lower court in which the record is then found" (citing authority).

In the Sioux Remedy Co. v. Cape, 235 U. S. at page 197, in the footnote it said:

"at the time of the allowance of the present writ of error the record had been sent to the Circuit Court of Turner County and so the writ was directed to that Court" (citing authority).

In Thomsen v. Cayser, 243 U. S. 66, a situation analogous to the present case existed. At page 83 of that decision this Court said:

"Subsequently a petition for the writ of error was filed and allowed and all further proceedings upon the part of the defendant for the enforcement of the judgment were suspended until the final determination of this Court upon the writ of error in return to which

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the record was properly furnished" (citing authority).

In the instant case the Supreme Court of Illinois specifically stayed any further action in this cause pending the determination of the petition for a writ of certiorari in this Court and further provided that upon its being granted, and as it was in the specific case, the mandate was further stayed until this Court decided the cause.

The mandate of this Court must run to the Supreme Court of Illinois under these circumstances in order to have proper judicial continuity.

Since the jurisdiction and the original record were in the Supreme Court of Illinois and the Appellate Court for the Fourth District has not been reinvested with jurisdiction, the writ must properly run to the Supreme Court of Illinois to whom it was properly addressed and which court certified the record in this cause to this Court in obedience thereto.

In Polleys v. Black River Co., 113 U. S. 81, at 82, and Lee v. Johnson, 116 U. S. 40, at 49, it is held that where the mandate has issued and the record is in the lower court, then the Writ properly runs to that Court.

Here, however, no such situation existed and the Writ could only proceed to the Supreme Court of Illinois.

Logic alone will dictate that both the Writ and the ultimate mandate of this Court must be directed to the Supreme Court of Illinois.

If this Court after determination of this cause were to send its mandate to the Appellate Court rather than to the Supreme Court of Illinois, that Court would be at a loss to in any manner proceed in the cause in conformity with the directions of such mandate. For so far as the

Appellate Court of Illinois is concerned, this matter is still pending in the Supreme Court of Illinois. It has never received any mandate from that Court indicating the disposition of this cause. It legally is yet unaware of the decision made by the Supreme Court of Illinois on the petition for leave to appeal.

On this point it finally resolves that not only was it proper to send the writ of this Court to the Supreme Court of Illinois but under the status of the record it could not have properly gone elsewhere.

The foregoing properly illustrated that respondent had actually no justification for challenging the jurisdiction of this Court to issue the writ on the whole of the record. Perhaps this is the reason it failed to furnish the record as the rules required it to do.

THIS CAUSE IS GOVERNED BY THE DECISIONS OF THIS COURT.

The portion of respondent's brief related to the rules governing new trials, judgments notwithstanding the verdict and the power of the appellate court to remand this cause is in no wise related to the actual question presented.

The question of the rights of a litigant asserting a federal statutory ground as a basis for relief in a state court is the basic problem involved.

Particularly here, the question is what are such a litigant's rights, when he asserts same in an action under the Safety Appliance Act?

In such actions the construction given these claims by this Court are ultimately controlling (See petitioner's brief herein at pages 13-14).

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What may be the situation in other types of proceedings has no bearing, because here we are dealing with specific statutory remedies. The construction and effect to be given these remedies is one solely for the final determination of this Court.

This Court has precisely delineated the authority of state courts in the review of these cases. It specifically enjoins them from weighing the evidence and substituting their opinions for those of the triers of fact. (See cases at pages 19, 20, 21 of petitioner's brief.)

The fact that the procedural provisions of the Illinois law specifically permit state courts of review to proceed contrary to the holdings of this Court in reviewing these cases, means only that the State rule must yield in the necessity of harmony and the granted right of a litigant to receive federal protection in federal statutory actions in state courts (see authorities at pages 22 and 23 of petitioner's brief herein).

THE CONFUSION OF ILLINOIS DECISIONS COMPELS THE ATTENTION OF THIS COURT.

The urgent need of this Court to rectify the confusion present in the judicial determination of the various Illinois cases on this point is best illustrated by reference to them.

All variety of views are found. In the case at bar, as in the case of Parthan v. Elgin J. & E. Ry. Co., 325 Ill. App. 408, 60 N. E. 2d 464, the respective Appellate Courts held that the state rule or practice granting the right of the appellate court to weigh the evidence on review governed.

In the Parthan case the Appellate Court for the First District of Illinois specifically stated on this point:

"In Tennant v. Pekin Union Railway Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520, relied upon by plaintiff, suit was filed in a Federal District Court and the case is, therefore, not applicable."

Holding to the correct rule and in direct contravention of the foregoing are the decisions in Nichell v. Baltimore & Ohio R. Co., 106 N. E. 2d 738, 347 Ill. App. 202, and one (decided by the very Court who decided the case at bar) of Grosse v. Terminal R. R. Ass'n. of St. Louis, 307 Ill. App. 414, 29 N. E. 2d 1018. In the latter case it was specifically held that appellate courts could not weigh the evidence under controlling federal law.

To compound the confusion one then has the case of Mitchell v. L. & N. Ry. Co., 375 Ill. 545, 31 N. E. 2d 965, wherein the Supreme Court of Illinois reversed and remanded to the Appellate Court for the Fourth District of Illinois, an action under the act with general language to the effect that the Appellate Court could weigh the evidence.

However, when the Appellate Court received the case back and reviewed it after reversal (310 Ill. App. 563, 35 N. E. 2d 81), it didn't take the general language of the Supreme Court (which would ordinarily have been correct had not the case been under the Federal Employers' Act) literally, but rather applied the correct rule concerning its right to weigh the evidence and said, after conceding it was governed by the federal law in regard to the contention that the verdict was against the manifest weight of the evidence, at page 86 of the Northeastern Reporter:

"The federal courts have held that the fact that the verdict and the judgment are against the weight of the evidence, are not for the determination of an appellate court." (Citing authority.)

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This, the same Appellate Court which held it had such authority in the case at bar.

This creates a situation where if a litigant seeks the proper Illinois Appellate District, he can recover under a given situation and in another district under the exact same set of facts he cannot.

If he is unhappy enough to be in the Fourth Appellate Court District, his case may go either way, depending upon which authority that Court may rely, it having decided the question both ways.

If he gets to the Supreme Court of Illinois, he again may be subjected to either rule, but if he is treated as the plaintiff was in the case of Mitchell v. L. & N. Ry. Co., 375 Ill. 545, 31 N. E. 2d 965, the evidence will be weighed, because in that case the Supreme Court directed the Appellate Court to which the case was reversed to do so as was previously noted.

Such confusion cannot be permitted to exist. Claimants asserting federal rights in state courts are entitled to know what their rights are and what they can expect in their respective causes. This Court alone can remedy this circumstance. This cause presents a perfect situation for it to do so. For here the Appellate Court has specifically stated that it had the authority required to weigh the evidence.

The point that this Court cannot review the facts of this case is premised on the contention that no federal question is presented. This is, of course, not the case as has been indicated and further reply to this need not be made.

THE FEDERAL RULES OF PROCEDURE DO NOT APPLY TO THE STATE COURTS.

Respondent's argument that it was entitled to a physi examination of petitioner as provided by the Federal Ru of Civil Procedure, is wrong because of two incorr assumptions.

First, that the Federal Rules of Civil Procedure ap to state courts.

They specifically do not, by their own terms, and t Court in Rader v. Baltimore & Ohio R. Co., 108 Fed. 980, at 986, held contrary to respondent's contention as their application.

Secondly, that this Court would reverse this cause f a new trial and therefore permit such an examination.

It is respectfully submitted that this Court cannot r verse this cause for a new trial. When petitioner stru the remanding clause of the Appellate Court's decisi herein, this cause became final and appealable. The que tion of a new trial is no longer possible for either party.

The proper order here should be similar to that enter in Lily v. Grand Trunk W. Ry. Co., 317 U. S. 481, that i that "the judgment below is reversed and the cause r manded for further proceedings not inconsistent with t opinion."

The prayer of the petitioner that the judgment of t Supreme Court of Illinois be reversed may be an ina curacy although in effect this is what this Court does i such instance.

An order such as above mentioned sent by mandate this Court to the Supreme Court of Illinois (whose mandat is stayed, pending this Court's decision) can in turn b

transmitted to the Appellate Court by the mandate of the Illinois Supreme Court which will be in accordance with that of this Court.

In such a fashion proper continuity is established and actually a better mode of procedure results. It was for this reason that counsel stayed the mandate of the Supreme Court of Illinois and properly requested that the Writ be directed to that Court.

Respectfully submitted,

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APPENDIX.

Rule 16, Appellate Court, Fourth District of Illinois:

Mandates.

No mandate shall issue in any case until 15 days shall have elapsed from the time of the entry of the judgment, and if petition for rehearing is filed until 10 days after the petition is denied, unless the court, or a justice in vacation, shall otherwise order. No mandate shall issue on any final judgment rendered in this court from which it shall be competent for the Supreme Court to grant leave to appeal until the time for filing a petition for leave to appeal shall have expired if the party entitled to file the petition has filed with the clerk of this court within 5 days after the judgment shall have become final as provided in Section 75 (2) of the Civil Practice Act, S. H. A. ch. 110, § 199 (2), an affidavit of the party and his attorney with proof of service of a copy on the opposing party that the party in good faith intends to file a petition for leave to appeal within the time provided by law. If the petition is filed within the proper time, no mandate shall issue until the petition shall have been granted or refused. This court, or a justice in vacation, upon motion may provide otherwise, or stay the mandate upon such terms as shall be determined.

Subparagraph 1 of Rule 32 of the Supreme Court of Illinois (Ill. Revised Statutes, Chapter 110, para. 259.32):

259.32 (Supreme Court Rule 32). Leave to appeal from the Appellate to the Supreme Court. (1) The party applying for leave to appeal from an Appellate Court to the Supreme Court shall file a petition therefor in the Supreme Court, stating therein the reason and grounds of appeal.

The clerk of the Supreme Court shall thereupon tran
a certificate of such filing to the clerk of the Appe
Court who shall transmit to the clerk of the Supreme C
the same record which was transmitted to the Appe
Court, with a certified copy of the record of the Appe
Court appended thereto. In case the leave shall no
granted the record shall be returned forthwith to the c
of the Appellate Court.

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HAROLD B. WILLEY, Cle

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 125.

WAYNE HARSH,
Petitioner,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 125.

WAYNE HARSH,
Petitioner,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Appellate Court of Illinois, Fourth District, is reported at 351 Ill. App. 272, 114 N. E. (2d) 901. The Supreme Court of Illinois denied Leave to Appeal without written opinion (R. 154).

JURISDICTION.

Petitioner predicates his claimed cause of action and right of recovery herein solely upon the Federal Boiler Inspection Act of 1924 (45 U. S. C. A., Secs. 22-34), for his Complaint (R. 39-43), pleads only Section 2 of said Boiler Inspection Act, and Petitioner is in error in indicating to this Court (His Pet. 2, 3, 4, 11, 12, 19) that the case at bar is brought under the "Safety Appliance Act" of 1893 (45 U. S. C. A., Secs. 1-16). The Federal Employers' Liability Act (45 U. S. C. A., Secs. 51-59) is not now pleaded herein and is not in issue in this cause, petitioner having dismissed Count II of his Complaint, predicated upon said Act, prior to the selection of the jury in this cause (R. 5).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether a State Appellate Court, reviewing a Federal Boiler Inspection Act case, has the power and duty to reverse the judgment therein and to remand the cause for a new trial where it finds that the verdict of the jury in such cause is against the manfiest or clear weight of the evidence?

2. Whether this Court can properly re-examine and pass upon the findings of fact of the Illinois Appellate Court in this cause in view of the provisions of Section 92 (3) (b) of the Illinois Civil Practice Act* [Ill. Rev. Stat. 1953, ch. 110, Par. 216 (3) (b)] limiting review by the Illinois Supreme Court on appeal of law actions from such Appellate Court "to questions of law only."

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* See page 4 of this Brief for quotation of this statute.

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STATUTES INVOLVED.

Federal.

45 U. S. C. A., Sec. 23—Section 2, Federal Boiler Inspection Act:

> "Use of unsafe locomotives and appurtenances unlawful; inspection and tests.
>
> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. Feb. 17, 1911, c. 103, §2, 36 Stat. 913; Mar. 4, 1915, c. 169, §1, 38 Stat. 1192; June 7, 1924, c. 355, §2, 43 Stat. 659."

State.

Ill. Rev. Stat. 1953, ch. 110, par. 199 (2) (c)—[Section 75 (2) (c) Illinois Civil Practice Act], in pertinent part, is as follows:

> "In any case heard and determined in the trial court upon actual trial in which the Appellate Court upon appeal from the final judgment or decree entered in the cause in the trial court reverses said judgment or decree and remands the cause for a new trial or

hearing, and in which the party in whose favor the trial court's judgment or decree was rendered shall present to and file with the Appellate Court an affidavit stating that he will be unable on a future trial or hearing to adduce other or additional evidence, facts or circumstances that were adduced in the trial court and expressly waiving the right to a new trial or hearing and consenting and requesting that the portion of the judgment of the Appellate Court remanding the cause for new trial or hearing be deleted and stricken from the judgment of the Appellate Court, then that court upon motion shall amend its judgment by striking out the portion thereof remanding the cause for new trial or hearing. Thereupon it shall be competent for the Supreme Court to grant leave to appeal from said final judgment of reversal for its review and determination with the same power and authority in the case, and with like effect, as in other cases in which leave to appeal from the final judgments of the Appellate Courts is authorized in this section."

Ill. Rev. Stat. 1953, ch. 110, par. 216 (3) (b)—[Section 92 (3) (b) Illinois Civil Practice Act], in pertinent part, is as follows:

"Error of fact, in that the judgment, decree or order appealed from is not sustained by the evidence or is against the weight of the evidence, may be brought up for review in any civil case: Provided, that, except as to equitable issues, the Supreme Court shall re-examine cases brought to it by appeal from the Appellate Courts, as to questions of law only. As amended by act approved July 2, 1947. L. 1947, p. 1349."

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REASONS RELIED ON FOR DENIAL OF WRIT.

1. The settled Federal and Illinois Rules are that the granting of a new trial is a matter of procedure only and such Federal rule was recognized and sanctioned by this Court in its promulgating of Rule 59, Fed. Rules Civ. Proc., providing for the granting of new trials "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States."

2. The Illinois rule is that the Appellate Court has the power and duty to remand a law cause for new trial if it finds that the verdict of the jury is against the manifest weight of the evidence.

3. The Federal Rule is (a) that the Federal trial judge in a law action has the duty and power to award a new trial where the verdict of the jury is contrary to the clear weight of the evidence, even though there may be substantial evidence which would prevent the direction of a verdict, and the exercise of such duty and power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right; and (b) that a Federal reviewing court has the power and duty to reverse a Federal trial court and remand for a new trial where the failure of such trial court to award a new trial amounts to an abuse of discretion, as where the verdict of the jury is against the clear (or manifest) weight of the evidence.

4. The Federal Rule and the Illinois Rule governing appellate review of orders granting or refusing new trials are the same.

5. The petitioner in this cause, by his own affirmative act, admitted the procedural law of Illinois applied when he, pursuant to Section 75 (2) (c) of the Illinois Civil

Practice Act* [Ill. Rev. Stat. 1953, ch. 110, par. 199 (2) (c)], caused the Appellate Court to strike out the portion of its judgment herein remanding this cause for a new trial (R. 150).

ADDITIONAL STATEMENT OF THE CASE.

The Petitioner, having predicated his right of recovery herein solely upon a claimed violation of Section 2 of the Federal Boiler Inspection Act of 1924 (45 U. S. C. A., Sec. 23), had the burden of proving that the trolley retriever was defective and that such defect was the proximate cause of his injury [**Zachritz v. St. L. & S. F. Ry. Co.** (1935), 336 Mo. 801, 806-807, 81 S. W. (2d) 608, 611, certiorari denied (1935), 296 U. S. 584, 58 S. Ct. 95, 80 L. Ed. 413; **Fryer v. St. L. & S. F. Ry. Co.** (1933), 333 Mo. 740, 749-758, 63 S. W. (2d) 47, 50-55; **Riley v. Wabash Ry. Co.** (1931), 328 Mo. 910, 917-923, 44 S. W. (2d) 136, 138-141; **Harlan v. Wabash Ry. Co.** (1934), 335 Mo. 414, 422, 423, 73 S. W. (2d) 749, 752, 753; **Pryor v. Chicago, R. I. & P. Ry. Co.** (1934), 170 Okla. 158, 162-165, 39 P. (2d) 563, 568-571; **Lynch v. Delaware, L. & W. R. Co.**, 2 Cir. (1935), 58 F. (2d) 177; **Ehalt v. McCarthy** (Utah, 1943), 138 P. (2d) 639, 642-646; **Camp v. Atlantic Coast Line R. Co.** (Alabama, 1948), 36 So. (2d) 331, 335].

The facts in the case at bar appear in the opinion of the Appellate Court (351 Ill. A. 272, 114 N. E. [2d] 901) and will be here quoted only as they relate to a defect in such retriever.

The Appellate Court, in passing upon defendant's motions for judgment n. o. v. and for a new trial, first found that (p. 277 of 351 Ill. A.) "Plaintiff's evidence does not include any affirmative, specific evidence of a defect in the retriever in question," but then found that (p. 278 of 351

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* See page 3 of this Brief for quotation of this statute.

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Ill. A.) "plaintiff's evidence taken as true has sufficient probative force to require the issues to be submitted to a jury. Robson v. Pennsylvania R. Co., 337 Ill. App. 557, 86 N. E. (2d) 403," and thus ruled against defendant upon its motion for judgment n. o. v.

However, in passing upon defendant's motion for new trial, the Appellate Court said:

> pp. 278-279—"Defendant further contends that the verdict of the jury finding a violation of the Boiler Inspection Act is contrary to the manifest weight of the evidence. In general, it may be said that plaintiff's evidence of injury resulting from the allegedly defective retriever was contradicted in many particulars, but these contradictions went to the point of plaintiff's credibility and were resolved by the jury in his favor. However, with respect to the existence of the alleged defect, certain undisputed facts were established by the evidence. Plaintiff himself testified that before the run back to Alton was started, he saw the motorman set the pole that plaintiff had left in the retrieved position under the hook on top of the car, and that he presumed the retriever was reset at that time. *(See: R. 74, 75.) Further, on cross-examination of the mechanical engineer who gave opinion evidence on plaintiff's behalf as to possible defects in the retriever which would cause it to retrieve unexpectedly, it was stated that these same defects would prevent the retriever from oprating normally at all. *(See: R. 85.) Yet the evidence shows that the retriever operated normally before and after the incident complained of. In order for the retriever to have retrieved the trolley pole when it jumped the line going to the depot, it must have been in good working order; again, when the motorman

* Refers to pages of Record in this Court.

reset the retriever and placed the pole on the hook before the return trip to Alton, the retriever operated normally. These facts, to be gathered from plaintiff's evidence, in our view, appear more favorable to the defendant than to the plaintiff. The evidence further showed that what happened to plaintiff on this occasion had happened to him and to others from time to time without the retriever having been defective. The burden rested on plaintiff to show that on this occasion a defect existed and that it proximately caused his injury. With respect to the alleged defect, it is clear from all the evidence that this burden of proof was not satisfied. The inference of a defect arising from plaintiff's circumstantial evidence is manifestly outweighed by the showing that the retriever worked normally before and after the incident and by the other evidence in the record. It is, therefore, our conclusion from all the evidence that the jury finding of a violation of the Boiler Inspection Act is clearly against the manifest weight of the evidence. Robertson v. Louisville & N. R. Co., 327 Ill. App. 44, 63 N. E. (2d) 608."

and thus ruled in favor of defendant upon its motion for new trial.

The right and power of the Appellate Court to so rule is, we believe, the only question properly presented to this Court.

SUMMARY OF ARGUMENT.

The case at bar primarily presents this simple question: Does a State Appellate Court, reviewing a Federal Boiler Inspection Act case, have the power and duty to reverse the judgment therein and to remand the cause for a new trial where it finds that the verdict of the jury in such cause is against the manifest or clear weight of the evidence?

It is settled law in Illinois that State courts of review do have such power and duty and the Appellate Court herein correctly applied such Illinois rule of law in deciding the case at bar and the Illinois Supreme Court properly followed such rule of law in denying Leave to Appeal herein.

It is also settled Federal law that Federal Courts of review likewise have such power and duty; and that the Illinois rule and the Federal rule are the same.

It follows then that under either or both rules this Court should deny certiorari in this cause.

The secondary question presented in this cause is: Does this Court have the right to review the facts in this cause in view of the provisions of Section 92 (3) (b) of the Illinois Civil Practice Act *[Ill. Rev. Stat. 1953, ch. 110, par. 216 (3) (b)], which make the findings of fact of the Appellate Court on the weight of the evidence final and binding on the Illinois Supreme Court? The answer to this question is, we believe, no.

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* See page 4 of this Brief for quotation of this statute.

ARGUMENT.

Before citing and discussing the Illinois and Federal authorities and rules governing appellate review of judgments and orders granting and refusing new trials it is to be noted that under Illinois law (**Ogdon v. Gianakos**, 415 Ill. 591, 595, 596, 114 N. E. (2d) 686; **Parthun v. Elgin, J. & E. Ry. Co.** (1st, 1945), 325 Ill. App. 408, 411, 60 N. E. (2d) 464, **appeal denied**, 326 Ill. App. xv) and under Federal law (**Aetna Casualty & Surety Co. v. Yeatts**, 4 Cir., 1941, 122 F. 2d 350, 352; **Kaufman v. Atlantic Greyhound Corp.**, D. C. S. D. W. Va., 1941, 41 F. Supp. 252, 254) the granting or refusing of a new trial is a matter of procedure and the last-cited Federal cases also squarely hold that Federal courts are not in any way subject to the rules of state practice governing new trials.

I.

The Appellate Court Had the Power to Remand the Case at Bar for New Trial Under the Settled Illinois Law Governing This Cause.

The Illinois Supreme Court has heretofore, in effect, ruled on the point under discussion by its denial of leave to appeal, 326 Ill. A. xv, in the case of **Parthun v. Elgin, J. & E. Ry. Co.** (1945), 325 Ill. A. 408, 60 N. E. (2d) 464, wherein the First District Appellate Court, in squarely holding that it had the right, **under the governing state practice**, to grant a new trial in a F. E. L. A. case, said:

> p. 411—"Defendant contends here that the verdict is excessive, and against the manifest weight of the evidence. Plaintiff claims that this court is bound by the decisions of the Federal Courts in cases of this kind and has no authority to weigh the evidence. Under Section 56 of the F. E. L. Act, plaintiff had the

right to sue in a Federal District Court or in a State Court. Miles v. Ill. Cen. R. R. Co., 315 U. S. 698. **Having chosen courts of this State, he must prosecute his action in accordance with our modes of procedure** (Minn. & St. Louis R. R. Co. v. Bombolis, 241 U. S. 211), and we have authority to weigh the evidence to determine whether the verdict should stand or whether it should be set aside and the cause retried. [Chap. 110, Par. 216, Sub-par. (3) b, Ill. Rev. Stats. (Jones Ill. Stats. Ann., 104,092, subpar. (3) b); Corcoran v. City of Chicago, 373 Ill 567; and Mitchell v. L. & N. R. R. Co., 375 Ill. 545.] **In Tennant v. Peoria & Pekin Union Railway Co., 321 U. S. 29, relied upon by plaintiff, suit was filed in a Federal District Court and the case is, therefore, not applicable.**" (Emphasis supplied.)

In the cited case of **Mitchell v. L. & N. R. R. Co.**, 375 Ill. 545, 31 N. E. (2d) 965, the Illinois Supreme Court, in instructing the Fourth District Appellate Court as to the procedure it should follow in remanding F. E. L. A. cases for new trial, said:

> p. 551—"The Appellate Court has reversed the judgment of the trial court without remanding. Where there is any evidence to support the Plaintiff's cause of action the Appellate Court should not enter such a judgment, but if it finds that the judgment of the trial court is manifestly against the weight of the evidence it should reverse and remand for a new trial. The judgment of the Appellate Court is, therefore, reversed and the cause is remanded to that court, with directions to consider the weight of the evidence and to consider any other errors relied upon for a reversal.
>
> "Reversed and remanded, with directions."

In the cited case of **Corcoran v. City of Chicago**, 373 Ill. 567, 27 N. E. (2d) 451, such Court sustained the constitu-

tionality of said Section 92 (3b) of the Civil Practice Act* (Ill. Rev. Stat. 1951, ch. 110, par. 216) and held that such section did not deprive a plaintiff of the right to a jury trial in a case where a verdict for the plaintiff is set aside and the remanding order is stricken on the plaintiff's motion (as was done in the case at bar) because he is unable to produce any further evidence on another trial. And in **Mabee v. Sutliff & Case,** 404 Ill. 27, 88 N. E. (2d) 769, such court followed the **Corcoran** case, supra, 373 Ill. 567, 27 N. E. (2d) 451, in holding that the Appellate Court is authorized to determine whether the verdict is against the weight of the evidence and that the facts found by the Appellate Court are binding upon such Supreme Court.

This Court does not require our aid in interpreting and applying its holding in **Minneapolis & St. L. R. Co. v. Bombolis,** 241 U. S. 211, 60 L. ed. 961, 36 S. Ct. 595, decided without dissent in 1916, and thoroughly reviewed in 1952, in the concurring opinion rendered in **Dice v. Akron, C. & Y. R. Co.,** 342 U. S. 359, 96 L. ed. 398, 72 S. Ct. 312.

We do submit that the **Bombolis** case, supra, confirms our position that the case at bar is governed by Illinois "new trial" law.

It is here to be noted that petitioner solely by his own affirmative act, in causing the Appellate Court to strike out the portion of its judgment herein remanding this cause for a new trial (R. 150), has admitted that the procedural law of Illinois applied and is bound thereby.

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* See page 4 of this Brief for quotation of this statute.

II.

New Trial Rules in Federal Courts.

A. Power and Duty of Federal Trial Judge.

Rule 59, Fed. Rules Civ. Proc., provides that Federal Trial Courts may grant a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States."

The Federal Courts have consistently and uniformly held (**Charles v. Norfolk & Western Ry. Co.**, 7 Cir., 1951, 188 F. 2d 691, 695, certiorari denied 342 U. S. 831, 72 S. Ct. 55, 96 L. Ed. 628; **Daffinrud v. United States**, 7 Cir., 1944, 145 F. 2d 724, 725; **Aetna Casualty Co. v. Yeatts**, 4 Cir., 1941, 122 F. 2d 350, 352-354; **General Accident, Fire & Life Assur. Corp. v. Dickinson**, D. C. N. D. Cal., N. D., 1945, 61 F. Supp. 153, 156; **Kaufman v. Atlantic Greyhound Corp.**, D. C. S. D. W. Va., 1941, 41 F. Supp. 252, 254) that Rule 59 makes it the duty of the Federal Trial Judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, even though there may be substantial evidence which would prevent the direction of a verdict.

The above-cited case of **Aetna Casualty & Surety Co. v. Yeatts**, 4 Cir., 1941, 122 F. 2d 350, is apparently the leading Federal case on the power and duty of the Federal Court Trial Judge to grant a new trial where the verdict of the jury is against the clear weight of the evidence. For this reason and the further reason that the Petition for a Writ of Certiorari filed herein cites and argues "directed verdict" law instead of "new trial" law, we will quote the following from this most pertinent decision:

> pp. 352-353—"The motion to set aside the verdict and grant a new trial was a matter of federal procedure,

governed by Rule of Civil Procedure 59 and not subject in any way to the rules of state practice. On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right. Smith v. Times Pub. Co., 178 Pa. 481, 36 A. 296, 35 L. R. A. 819; Bright v. Eynon, 1 Burr. 390; Mellin v. Taylor, 3 B. N. C. 109, 132 Eng. Reports 351. The matter was well put by Mr. Justice Mitchell, speaking for the Supreme Court of Pennsylvania in Smith v. Times Publishing Co., supra (178 Pa. 481, 36 A. 298), as follows: 'The authority of the common pleas in the control and revision of excessive verdicts through the means of new trials was firmly settled in England before the foundation of this colony, and has always existed here without challenge under any of our constitutions. It is a power to examine the whole case on the law and the evidence, with a view to securing a result, not merely legal, but also not manifestly against justice—a power exercised in pursuance of a sound judicial discretion, **without which the jury system would be a capricious and intolerable tyranny,** which no people could long endure. This court has had occasion more than once recently to say that it was **a power the courts ought to exercise unflinchingly.**' (Emphasis supplied.)"

The court then exhaustively reviewed the authorities, tracing the history of the above power back to 1665 and to the Magna Charta, and then said:

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p. 354—"To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require.

"The distinction between the rules to be followed in granting a new trial and directing a verdict were stated by us with some care in Garrison v. United States, 4 Cir., 62 F. 2d 41, 42, from which we quoted with approval in the later case of Roedegir v. Phillips, 4 Cir., 85 F. 2d 995, 996, as follows: 'Where there is substantial evidence in support of plaintiff's case, the judge may not direct a verdict against him, even though he may not believe his evidence or may think that the weight of the evidence is on the other side; for, under the constitutional guaranty of trial by jury, it is for the jury to weigh the evidence and pass upon its credibility. He may, however, **set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence**, or is based upon evidence which is false; for, even though the evidence be sufficient to preclude the direction of a verdict, it is still his duty to exercise his power over the proceedings before him to prevent a miscarriage of justice. See Felton v. Spiro (6 Cir.), 78 F. 576. Verdict can be directed only where there is no substantial evidence to support recovery by the party against whom it is directed or where the evidence is all against him or so overwhelmingly so as to leave no room to doubt what the fact is. Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720. **Verdict may be set aside and new trial granted, when the verdict is contrary to the clear**

weight of the evidence, or whenever in the exercise of a sound discretion the trial judge thinks this action necessary to prevent a miscarriage of justice.' . . ." (Emphasis supplied.)

(See: **Corcoran v. City of Chicago,** 373 Ill. 567, 571-580, for review of common law right of appellate courts to remand for new trial where verdict of jury was against manifest weight of evidence. **Followed** and reaffirmed **Olson v. Chicago Transit Authority** (1953), 1 Ill. 2d 83, 85, 86.)

B. **Power and Duty of Federal Reviewing Court.**

The foregoing authorities conclusively establish the principle of law that a Federal Court trial judge has the power and **absolute duty** to award a new trial where the verdict of the jury is against the clear weight of the evidence, as the Appellate Court has found to be the case in this cause (351 Ill. A. 283, 114 N. E. [2d] 898).

The next question, presented is: Does a Federal Reviewing Court have the power to reverse and remand for a new trial where such Federal Court trial judge has failed and refused to perform his absolute duty to grant a new trial?

This question was answered in the affirmative by the Fourth Circuit Court of Appeals in the case of **Virginian Ry. Co. v. Armentrout** (1948), 166 F. 2d 400. In that case such court, speaking through Judge Parker, first pointed out that this was the second appeal (p. 401) "in the distressing case of the infant whose hands and portions of whose arms were cut off by a backing locomotive" and that in the first appeal it had awarded a new trial (p. 401) "for errors in the charge of the court." (See 158 F. 2d 358.)

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The court then discussed the facts to show that an award of $160,000 to a child who was 13 months old at the time of injury was excessive, reviewed (p. 408) the authorities on the well-established power and duty of the trial judge to grant a new trial and then said:

pp. 408-409—"The power of this court to reverse the trial court for failure to exercise the power, where such failure, as here, amounts to an abuse of discretion, is likewise clear. It is true that under Section 22 of the Judiciary Act of 1789, 28 U. S. C. A. #879, there may be no reversal on writ of error for any error in fact; and this rule has been frequently applied where reversal is sought because damages are excessive or inadequate. Fairmont Glass Works v. Cub Fork Coal Co., 287 U. S. 474, 53 S. Ct. 252, 77 L. Ed. 439. We do not understand the rule to have application, however, **in those exceptional circumstances where the verdict is so manifestly without support in the evidence that failure to set it aside amounts to an abuse of discretion.** In a situation of that sort, **reversal is no more based on 'error in fact' than reversal for refusal to direct a verdict for insufficiency of evidence.** Whether there has been an abuse of discretion **is a question of law in the one case, just as is the legal sufficiency of the evidence in the other.** An Appellate court **is not required to place the seal of its approval upon a judgment vitiated by an abuse of discretion.** . . ." (Emphasis supplied.)

"That abuse of discretion in refusing to set aside a verdict is an exception to the rule that the granting or refusing of a new trial is not assignable as error, is definitely recognized in the following decisions: Detroit Transfer Co. v. Pratt, 6 Cir., 2 F. 2d 193; Carter Coal Co. v. Nelson, 4 Cir., 91 F. 2d 651, 654; Western Union Tel. Co. v. Dismang, 10 Cir., 106 F. 2d

362, 364; Southern Fruit Distributors v. Fulmer, 4 Cir., 107 F. 2d 456, 459. In the case of Carter Coal Co. v. Nelson, supra (91 F. 2d 654), this court, speaking through Judge Soper, said: 'The established rule in the federal appellate courts is that they have no power to review the action of a trial court in granting or denying a motion for a new trial for error of fact. Such a matter lies wholly within the discretion of the trial court and **it is only when there is an abuse of such discretion that its action is reviewable.**' (Emphasis supplied.)" . . .

"For the reasons stated, the judgment appealed from will be reversed and the cause will be remanded for a new trial."

In **Commercial Credit Corp. v. Pepper** (1951), 187 F. 2d 71, the Fifth Circuit Court of Appeals followed the **Virginian Ry. Co.** case, supra, 166 F. 2d 400, in reversing and remanding for a new trial, and in the course of its opinion said:

pp. 75-76—"Under the circumstances presented, and quite independent of the error in the charge, we are of opinion that the trial court erred in denying plaintiff's motion for a new trial. It is a principle well recognized in the federal courts that the granting or refusing of a new trial is a matter resting within the discretion of the trial court. The term 'discretion,' however, when invoked as a guide to judicial action, means a sound discretion, exercised with regard to what is right and in the interest of justice. And an appellate court is not bound to stay its hand and place its stamp of approval on a case when it feels that injustice may result. Quite to the contrary, it is definitely recognized in numerous decisions that an abuse of discretion is an exception to the rule that the granting or refusing of a new trial is not assignable as error.

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"Upon the record before us, we hold that it was an abuse of discretion to deny plaintiff's motion for a new trial."

Even some of the authorities cited and quoted by the Petitioner in his Petition in this Court support the power of the Court of Appeals to remand for a new trial, for in the cited case (Pet. 14) of **Witherbee v. Elgin, Joliet & Eastern Ry. Co.** (1951), 191 F. 2d 302, the Seventh Circuit Court of Appeals remanded a F. E. L. A. case for a new trial, and in the cited case (Pet. 14) of **Stanczak v. Pa. Ry. Co.** (1949), 174 F. 2d 302, the same Court refused to grant a new trial in a F. E. L. A. and Safety Appliance Act case because there was no abuse of discretion by the Federal Trial Judge. And in the cited case (Pet. 14, 16) of **Grand Trunk Western Ry. Co. v. Heattie** (1931), 48 F. 2d 759, the Sixth Circuit Court of Appeals also denied a new trial because there was no abuse of discretion. Furthermore, in the cited case (Pet. 12, 14) of **Williams v. New York Central R. R.**, 402 Ill. 494, 84 N. E. (2d) 399, a suit under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, et seq.) and the Federal Safety Appliance Act (45 U. S. C. A., Secs. 1-16), the Illinois Supreme Court reviewed and cited (pp. 500-508) the decisions of this Court relied on by petitioner herein, in reaching the conclusion that the First District Appellate Court had erroneously entered a directed verdict judgment in favor of the defendant railroad, and then said:

p. 508—"From a careful analysis of the evidence considered in this case in connection with the rules and principles as announced under the Federal Employers' Liability Act, and the decisions pertaining thereto, we are of the opinion it cannot be said as a matter of law, that the verdict of the jury is without support in the evidence. We are not intimating in any way how the court should decide the factual

matters in this record other than to say the Appellate Court should apply the facts to each charge of negligence under the rules as we have above pointed out, *and make its determination accordingly.*

"The judgment, therefore, of the Appellate Court is reversed and the cause remanded to that Court, with directions to consider the assignment of errors other than the one decided, and to either affirm the judgment of the trial court, **or reverse it and remand the cause for a new trial.** Reversed and remanded, with directions." (Emphasis supplied.)

It is here to be noted that in its infrequent "Supplement to Opinion on Denial of Petition for Rehearing," the Appellate Court said (pp. 282-283 of 351 Ill. App.):

—"plaintiff contests, for the first time, the power of a reviewing court to consider the weight of the evidence in F. E. L. A. cases and to reverse and remand a judgment as against the manifest weight of the evidence. It is contended that once such court determines that there is sufficient evidence in the record to support submitting the issues to a jury, it has exhausted its function with respect to weighing the judgment against the evidence. Numerous cases are cited and relied upon, principally, Lavender v. Kurn, 327 U. S. 645, 90 L. Ed. 916, 66 S. Ct. 740; Ellis v. Union Pacific R. Co., 329 U. S. 649, 91 L. Ed. 572, 67 S. Ct. 598; Tennant v. Peoria & Pekin Union Railway Co., 321 U. S. 29, 88 L. Ed. 520, 64 S. Ct. 409; Williams v. New York Cent. R. Co., 402 Ill. 494, 84 N. E. (2d) 399; Nickell v. Baltimore & O. R. Co., 347 Ill. App. 202, 106 N. E. (2d) 738. **All of these cases deal with the questions of directed verdicts or judgments notwithstanding the verdicts and not with the reversal and remandment on the ground of a verdict against**

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the manifest weight of evidence." (Emphasis supplied.)

In rejecting this contention the Appellate Court said:

pp. 282-283—"The opinion of the court in the case at bar notes the fact that the evidence of an incident occurring and injury therefrom was highly contradicted, but that these issues relate to the credibility of witnesses and were decided by the jury in plaintiff's favor. **Such finding, therefore, was not disturbed.** On the issue of the existence of a defective appliance, this court did not weigh conflicting evidence, consider the credibility of the various witnesses, nor follow what it considered a more reasonable inference. It considered only **undisputed facts and circumstances. These facts were not susceptible of varying inferences but constituted a manifest weight of evidence in opposition to the claim of a defective or unsafe retriever.**

"Plaintiff has cited no authority, and we find none, which **removes the reviewing court's historical power to reverse and remand a case for new trial when it believes the verdict to be against the manifest weight of the evidence.** The cases cited do illustrate the reluctance of the reviewing courts to disturb findings on issues that are based on credibility of witnesses. We find in these authorities, however, no such restrictive rule of law as urged by plaintiff." (Emphasis supplied.)

From the above-quoted language it is obvious that on the issue of the existence of a defective retriever the Appellate Court did not weigh "conflicting evidence, consider the credibility of the various witnesses, nor follow what it considered a more reasonable inference" but that it "considered only undisputed facts and circumstances" which "were not susceptible of varying inferences but consti-

tuted a manifest weight of evidence in opposition to the claim of a defective or unsafe retriever."

It is also significant that petitioner raised this question only after such Appellate Court had reversed and remanded for a new trial; and that in this Court, also, he has cited no authority "which removes the reviewing court's historical power to reverse and remand a case for new trial when it believes the verdict to be against the manifest weight of the evidence."

In **Fine v. Paramount Pictures** (1950), 181 F. 2d 300, the Seventh Circuit Court of Appeals said:

> p. 302—"The purpose of a motion for a new trial is to point out to the trial court alleged errors, so that they may be corrected by that court, **and also for the purpose of furnishing a record to courts of appeals for the review of the action of the trial court.**" (Emphasis supplied.)

In **Patton v. Baltimore & O. R. Co.** (1952), 197 F. 2d 732, the Third Circuit Court of Appeals reversed the Trial Court and granted a new trial to the defendant railroad because such Trial Court had (p. 740) erroneously charged the jury in respect to the Federal Safety Appliance Act (45 U. S. C. A., Sec. 11).

In **Fairmount Glass Works v. Cub Fork Coal Co.** (1933), 287 U. S. 474, 53 S. Ct. 252, 77 L. ed. 439, this Court thoroughly discussed the authorities in reaching the conclusion that (p. 482 of 287 U. S., p. 444 of 77 L. ed.)— "Under certain circumstances the appellate court may inquire into the action of the trial court on a motion for a new trial."

In **Norfolk S. R. Co. v. Ferebee** (1915), 238 U. S. 269, 59 L. ed. 1303, 35 S. Ct. 781, this Court affirmed a judgment of

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the Supreme Court of North Carolina granting a partial new trial, to assess damages only, in a suit brought under the Federal Employers' Liability Act. And in **Gasoline Products Co. v. Champlin Refining Co.** (1931), 283 U. S. 494, 75 L. ed. 1188, 51 S. Ct. 513, this Court reversed, in part, the Court of Appeals for the First Circuit and ordered a new trial of all the issues raised by the counterclaim.

In **Wilkerson v. McCarthy** (1949), 336 U. S. 53, 70, 93 L. ed. 497, 508, 69 S. Ct. 413, a directed verdict case, the concurring opinion of Mr. Justice Douglas shows that this Court has repeatedly considered lower court decisions involving the granting or refusing of new trials in Federal Employers' Liability Act cases.

III.

Federal Rule and Illinois Rule Are Same.

Finally, we invite the attention of this Court to **Jennings v. Murphy** (1952), 194 F. 2d 35, wherein the Seventh Circuit Court of Appeals, in pointing out that the Federal rule and the Illinois rule governing the appellate review of orders granting or refusing new trials were the same, said:

> p. 38—"Furthermore, granting or refusing a motion for a new trial rests within the sound discretion of the trial court and its ruling in this respect can not be disturbed on appeal in the absence of a showing of a manifest abuse of such discretion. There being, we think, absence of clear abuse of discretion, the judgment must be affirmed. Firestone Tire & Rubber Co. v. Nollman, 5 Cir., 107 F. 2d 146; Fyre v. Lyon, 55 App. D. C. 48, 299 F. 926. **The same rule abides in Illinois where this accident occurred and where the case was tried.** Couch v. Southern Railway, 294 Ill. App. 490, 14 N. E. 2d 266; Corcoran v. City of

Chicago, 373 Ill. 567, 27 N. E. 2d 451." (Emphasis supplied.)

We ask this Court to note that in the Couch case, supra, 294 Ill. A. 490, 14 N. E. (2d) 266, the very same Fourth District Appellate Court affirmed the order of the City Court of East St. Louis granting a new trial to the plaintiff in a death action brought under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51).

Since the Federal rule and the Illinois rule are the same, there is no point in further arguing that the granting of a new trial is a matter of procedure; and that the Illinois rule is, therefore, controlling in the case at bar.

From the foregoing authorities it is obvious that Petitioner overlooks and misapprehends the settled Federal and Illinois law in arguing that the Appellate Court did not have the power to reverse the case at bar and remand the same for a new trial; and that the case at bar presents a question of Federal substantive law.

Petitioner further focused attention on his lack of proof to show a defective retriever when he filed an affidavit in such Appellate Court stating he had no further evidence to offer on a new trial. And he also thereby recognized the power and jurisdiction of such Appellate Court, **under governing Illinois procedure**, when he moved such Appellate Court to strike that part of its judgment remanding the case at bar for new trial so that he could file his Petition for Leave to Appeal in the Illinois Supreme Court. Petitioner does not complain of the Illinois procedural law that permitted him to take this action and he could not properly do so for it is settled law that when he selected such State forum he became bound by the procedural law of Illinois (Minn. & St. L. R. Co. v. Bombolis, 241 U. S. 211, 60 L. ed. 961, 36 S. Ct. 595; Parthun v. Elgin, J. & E.

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Ry. Co. [1st, 1945], 325 Ill. App. 408, 411, 60 N. E. [2d] 464, appeal denied 326 Ill. App. xv).

Petitioner again admitted Illinois procedural law governs the case at bar when he contended in the Appellate Court that Rule 35, Fed. Rules Civ. Procedure, permitting physical examination of a plaintiff, did not apply in the case at bar and that Illinois law controlled. In sustaining his then contention the Appellate Court said (p. 280 of 351 Ill. App.): "The granting to state courts of concurrent jurisdiction in F. E. L. A. cases does not require that a federal rule supplant the procedural law of a State." Petitioner's present contention that Federal procedural law controls the case at bar indicates that his legal reasoning changes as his needs require.

IV.

This Court Should Not Review the Findings of Fact Made by the Appellate Court.

The Petitioner, without any citation of authority, devotes the latter part of his Argument (His Pet. 19-22) to arguing that this Court should review the findings of fact made by the Appellate Court, in the event it finds that such Court had the authority to hold the jury verdict herein against the manifest weight of the evidence. In making such argument he (His Pet. 20-21) gives an incomplete and inaccurate version of his testimony and the testimony of his expert witness Paul Kline and the attention of this Court is invited to pages 74, 75, 85 of the Record herein and to pages 278, 279 of 351 Ill. App.

However, Section 92 (3) (b) of the Illinois Civil Practice Act * (Ill. Rev. Stat. 1953, ch. 110, par. 216) specifically provides that the findings of fact of the Appellate Court

* See page 4 of this Brief for quotation of this statute.

on the weight of the evidence, in law actions, shall be final and binding on the Illinois Supreme Court and such Court has squarely held that in law actions brought to it by appeal from the Appellate Court it "is restricted to re-examination as to questions of law only" (**Mabee v. Sutliff & Case Co.**, 404 Ill. 27, 32). (Accord: **Olson v. Chicago Transit Authority** [1953], 1 Ill. 2d 83, 89, 115 N. E. [2d] 301.)

Rule 38, paragraph 5 (a), of this Court states that the character of its reason for granting certiorari to state courts is "Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this court." The above Illinois statute certainly does not present "a federal question" calling for the exercise of the discretion of this Court, even though this Court should be of the opinion that it is not bound by said Illinois statute and has powers of review not possessed by the Illinois Supreme Court (Chrisman v. Miller, 197 U. S. 313, 319, 49 L. Ed. 770, 772, 25 S. Ct. 468; Chicago, M. & St. P. R. Co. v. Coogan, 271 U. S. 472, 474, 70 L. Ed. 1041, 1044, 46 S. Ct. 564).

And in the concurring opinion of Mr. Justice Douglas in **Wilkerson v. McCarthy** (1949), 336 U. S. 53, 70, 71, 93 L. Ed. 497, 509, it is said that "The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected."

It is respectfully submitted that the Appellate Court, in reversing and remanding this cause for a new trial before another jury, fully respected such "jury function"; that by petitioners' own affirmative acts he has admitted the procedural law of Illinois applied and does not question its application; and that this court should, therefore, deny certiorari in this cause.

CONCLUSION.

For the reasons urged in this Brief it is respectfully submitted that said petition for a writ of certiorari should be denied.

Respectfully submitted,

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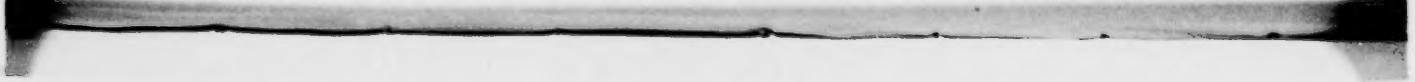

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 125.

WAYNE HARSH,
Petitioner,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois.

RESPONDENT'S BRIEF ON MERITS.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 125.

WAYNE HARSH,
Petitioner,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois.

RESPONDENT'S BRIEF ON MERITS.

OPINIONS BELOW.

The opinion of the Appellate Court of Illinois, Fourth District, is reported at 351 Ill. App. 272, 114 N. E. (2d) 901, and also appears at pages 15-22 of the Transcript of Record in this cause. The Supreme Court of Illinois denied Leave to Appeal without written opinion (R. 69).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 929 (3) of the Judiciary Act of June 25, 1948 [28 U. S. C. A. 1257 (3)].

HISTORY.

A somewhat extended statement of the course taken by the proceedings in the Illinois Courts is required to adequately explain the statutory provisions, Federal and State, involved in this cause and upon which the jurisdiction of this Court rests.

Petitioner predicates his right of recovery herein solely upon the Federal Boiler Inspection Act of 1924 (45 U. S. C. A., Secs. 22-34), for his Complaint in the Trial Court (R. 23) pleads only Section 2 of said Boiler Inspection Act, and Petitioner is in error in indicating to this Court (Pet. Br. 2) that this cause is brought under the Safety Appliance Act of 1893 (45 U. S. C. A., Secs. 1-16) (See: Urie v. Thompson, 337 U. S. 163, 188, 189, 93 L. ed. 1282, 1302, 1303, for distinction between the "Boiler Inspection" and "Safety Appliance" Acts). The Federal Employers' Liability Act (45 U. S. C. A., Secs. 51-59) is not now pleaded herein and is not now in issue in this cause, Petitioner having dismissed Count II of his Complaint predicated thereon prior to the selection of the jury that heard this cause (R. 25).

The Trial Court, prior to trial, denied (R. 26) Respondent's Motion, as amended, for a physical examination of the Petitioner, as provided for by Federal Rule of Civil Procedure 35. After the trial such Trial Court denied (R. 30) Respondent's Motion for Directed Verdict at the close of all of the evidence (R. 68), its Motion for Judgment N. O. V. (R. 28) and its alternative motion for a new trial (R. 28-30).

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The Respondent thereupon appealed this cause to the Appellate Court of Illinois, Fourth District, and that Court affirmed (R. 19, 20) the Trial Court denial of a physical examination of said Petitioner and (R. 17, 18) its denial of said Motion for judgment n. o. v., but (R. 21) reversed and remanded this cause for a new trial before another jury, because (R. 19) "the jury finding of a violation of the Boiler Inspection Act is clearly against the manifest weight of the evidence." Petitioner then filed a Petition for Rehearing in such Appellate Court and, for the first time, contested, as that Court said (R. 21), "the power of a reviewing court to consider the weight of the evidence in F. E. L. A. cases and to reverse and remand a judgment as against the manifest weight of the evidence." This Petition for Rehearing was denied (R. 21) in a Supplemental Opinion (R. 21-22).

The portion of the Illinois Appellate Court judgment (R. 21) remanding this cause for a new trial was an interlocutory judgment not reviewable by this court (Urie v. Thompson, 337 U. S. 163, 171, 93 L. ed. 1282, 1293), or by the Illinois Supreme Court on Petition for Leave to Appeal [Section 75 (2) (c), Illinois Civil Practice Act*— Ill. Rev. Stat. 1953, ch. 110, par. 199 (2); Corcoran v. City of Chicago, 373 Ill. 567, 569, 570, 27 N. E. 2d 451, appeal dismissed 311 U. S. 610, 85 L. Ed. 386, rehearing denied 311 U. S. 727, 85 L. Ed. 473).

Petitioner thereupon chose to waive his right (Corcoran v. City of Chicago, 373 Ill. 567, 569) to a new trial before another jury and did not take such new jury trial, as did the plaintiff in the **Urie** case, supra, 337 U. S. 163, 172, 93 L. Ed. 1282, 1293, and voluntarily moved (R. 68), pursuant to said Section 75 (2) (c) of the Illinois Civil Practice Act* [Ill. Rev. Stat. 1953, ch. 110, par. 199 (2)], the Illinois Appellate Court to strike the portion of its judgment

* See page 5 of this Brief for quotation of this statute.

remanding this cause for a new trial, so that the Illinois Supreme Court and this Court (Urie v. Thompson, 337 U. S. 163, 172, 93 L. ed. 1282, 1293, 1294) could review, and perhaps reverse, the resulting and then final Appellate Court judgment.

The Illinois Appellate Court granted (R. 68) such Motion. Petitioner thereupon filed his Petition for Leave to Appeal (R. 1-14) wherein he said "Because this case comes to this [Illinois Supreme] Court, solely on a legal question, that is, does a reviewing court in an action under the Federal Employers' Liability Act or Federal Safety Appliance Act, have the power to hold a jury verdict against the manifest weight of the evidence, there need be but scant reference to the facts."

The Illinois Supreme Court, without written opinion, denied (R. 69) such Leave to Appeal on March 10, 1954. The Petition for Writ of Certiorari was filed herein on June 7, 1954, and was granted on October 14, 1954 (R. 69).

The judgments of the Illinois Courts in this cause are in accordance with the established Illinois modes of practice and procedure, are in accord with the decision of this Court in **Minneapolis & St. L. R. Co. v. Bombolis**, 241 U. S. 211, 60 L. ed. 961, and do not involve, or violate, any substantial Federal right of the Petitioner which invokes the jurisdiction of this Court.

It is important to note that the trial judge who tried this cause and who saw and heard the witnesses reserved (R. 68) his ruling on Respondent's motion for directed verdict at the close of all the evidence (R. 68) and then departed this life before ruling thereon (folio 49). Respondent's said motion for directed verdict, its motion for judgment n. o. v. and its alternative motion for a new trial, were, therefore, denied by another trial judge solely upon the printed record and the arguments and briefs of counsel.

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STATUTES INVOLVED.

Federal.

45 U. S. C. A., Sec. 23—Section 2, Federal Boiler Inspection Act:

> "Use of unsafe locomotives and appurtenances unlawful; inspection and tests.
>
> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. Feb. 17, 1911, c. 103, § 2, 36 Stat. 913; Mar. 4, 1915, c. 169, § 1, 38 Stat. 1192; June 7, 1924, c. 355, § 2, 43 Stat. 659."

State.

Ill. Rev. Stat. 1953, ch. 110, par. 199 (2) (c)—[Section 75 (2) (c), Illinois Civil Practice Act], in pertinent part, is as follows:

> "In any case heard and determined in the trial court upon actual trial in which the Appellate Court upon appeal from the final judgment or decree entered in the cause in the trial court reverses said judgment or decree and remands the cause for a new trial or hear-

ing, and in which the party in whose favor the trial court's judgment or decree was rendered shall present to and file with the Appellate Court an affidavit stating that he will be unable on a future trial or hearing to adduce other or additional evidence, facts or circumstances than were adduced in the trial court and expressly waiving the right to a new trial or hearing and consenting and requesting that the portion of the judgment of the Appellate Court remanding the cause for new trial or hearing be deleted and stricken from the judgment of the Appellate Court, then that court upon motion shall amend its judgment by striking out the portion thereof remanding the cause for new trial or hearing. Thereupon it shall be competent for the Supreme Court to grant leave to appeal from said final judgment of reversal for its review and determination with the same power and authority in the case, and with like effect, as in other cases in which leave to appeal from the final judgments of the Appellate Courts is authorized in this section."

Ill. Rev. Stat. 1953, ch. 110, par. 216 (3) (b)—[Section 92 (3) (b), Illinois Civil Practice Act], in pertinent part, is as follows:

"Error of fact, in that the judgment, decree or order appealed from is not sustained by the evidence or is against the weight of the evidence, may be brought up for review in any civil case: Provided, that, except as to equitable issues, the Supreme Court shall re-examine cases brought to it by appeal from the Appellate Courts, as to questions of law only. As amended by act approved July 2, 1947. L. 1947, p. 1349."

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QUESTIONS PRESENTED FOR REVIEW.

1. Does the judgment of the Illinois Appellate Court remanding this cause for a new trial before another jury, under the governing Illinois statute (This Brief 6) permitting it so to do, present a substantial Federal question which invokes the jurisdiction of this Court?

2. Was the writ of certiorari herein improperly addressed to the Illinois Supreme Court so that it should be dismissed for lack of jurisdiction?

3. Does the procedural statute of Illinois (This Brief 5) deprive the plaintiff, in a state court Federal Boiler Inspection Act case, of a substantial Federal right of trial by jury, which will invoke the jurisdiction of this Court, where it permits him to voluntarily move and request such State Appellate Court to strike the portion of its judgment remanding the cause for a new trial before another jury, so that the portion of its judgment reversing such cause becomes final and, therefore, immediately reviewable by the Illinois Supreme Court and by this Court?

4. Whether a State Appellate Court, reviewing a Federal Boiler Inspection Act case, has the power and duty to reverse the judgment therein and to remand the cause for a new trial before another jury, where it finds that the verdict of the jury in such cause is against the manifest or clear weight of the evidence?

5. Does the law of the forum (Illinois) or Federal law control and determine the power and duty of a State Appellate Court to remand a state court Federal Boiler Inspection Act case for a new trial before another jury, where it finds the verdict of the jury in such cause to be against the manifest or clear weight of the evidence?

6. Whether this Court can properly re-examine and pass upon the non-Federal findings of fact of the Illinois Appellate Court in this cause in view of the provisions of Section 92 (3) (b) of the Illinois Civil Practice Act* [Ill. Rev. Stat. 1953, ch. 110, Par. 216 (3) (b)] limiting review by the Illinois Supreme Court on appeal of law actions from such Appellate Court "to questions of law only" and in view of the settled rule of this Court that it will not review non-Federal findings of fact made by state tribunals.

7. If this Court determines that Federal procedural law controls this cause, which Respondent emphatically denies, did the state court refuse Respondent a substantial Federal right in holding that Petitioner did not have to submit to a physical examination, as required by Federal Rule of Civil Procedure 35?

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* Quoted page 6 of this Brief

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STATEMENT OF THE CASE.

The Petitioner, having predicated his right of recovery *herein solely upon a claimed violation of Section 2 of the* Federal Boiler Inspection Act of 1924 (45 U. S. C. A., Sec. 23), had the burden of proving that the trolley retriever was defective and that such defect was the proximate cause of his injury. (**Baltimore & O. R. Co. v. Groeger**, 266 U. S. 521, 527, 69 L. ed. 419, 423; **Zachritz v. St. L. & S. F. Ry. Co.** [1935], 336 Mo. 801, 806-807, 81 S. W. [2d] 608, 611, certiorari denied [1935], 296 U. S. 584, 58 S. Ct. 95, 80 L. ed. 413; **Fryer v. St. L. & S. F. Ry. Co.** [1933], 333 Mo. 740, 749-758, 63 S. W. [2d] 47, 50-55; **Riley v. Wabash Ry. Co.** [1931], 328 Mo. 910, 917-923, 44 S. W. [2d] 136, 138-141; **Harlan v. Wabash Ry. Co.** [1934], 335 Mo. 414, 422, 423, 73 S. W. [2d] 749, 752, 753; **Pryor v. Chicago, R. I. & P. Ry. Co.** [1934], 170 Okla. 158, 162-165, 39 P. [2d] 563, 568-571; **Lynch v. Delaware L. & W. R. Co., 2 Cir.** [1935], 58 F. [2d] 177; **Ehalt v. McCarthy** [Utah, 1943], 138 P. [2d] 639, 642-646; **Camp v. Atlantic Coast Line R. Co.** [Alabama, 1948], 36 So. [2d] 331, 335.)

Petitioner recognized that it was necessary to allege and prove a defect, for he pleads an alleged "defective" retriever in paragraphs 6, 9 and 10 of his Complaint (R. 23, 24).

The facts in the case at bar are correctly stated in the opinion of the Illinois Appellate Court (R. 15-22, 351 Ill. App. 272, 114 N. E. 2d 901) and will be here quoted only as they relate to the purpose and normal operation of, and to an alleged defect in, such retriever and to correct certain unfounded statements appearing in Petitioner's Statement of the Case (Pet. Br. 5).

The purpose and normal operation of the retriever, of a type used by Respondent for over 20 years (R. 57), is

described by the Illinois Appellate Court as follows (R. 15-16):

> "Defendant operates an electric interurban line from Alton, Illinois, to St. Louis, Missouri. Trolley poles connect with an overhead power line in the normal fashion and are retracted automatically to a horizontal position on top of the car if the pole should slip off the power line. The mechanism by which the pole is thus retracted is called a 'retriever' and its alleged failure to operate properly is the basis of plaintiff's action. The retriever is an intricate device composed of powerful springs that are wound and set as the trolley pole rope is pulled out to put the pole in contact with the power line. Then if contact with the power line is broken and the rope suddenly jerked by the trolley springing free, the retriever is activated and causes the rope to be automatically and quickly rewound into the retriever, bringing the pole down to the top of the car. A retriever is located at both ends of the trolley car to control the trolley pole at that end. To 'set' a retriever requires a careful pulling of the trolley rope out of the retriever until the retriever springs are fully wound and a catch takes hold keeping the springs tightly wound. Any jerk of the line as the trolley is then allowed to ascend to make contact with the powerline, or a failure of the catch to hold the spring tension, will result in the line being quickly and powerfully rewound.
>
> "On April 25, 1950, plaintiff was the conductor on the first car of a three-car train pulling into the St. Louis depot two to four minutes late. As the cars crossed a switch, the rear trolley on plaintiff's car jumped the track and he climbed out to reset it. Plaintiff testified that he pulled out the rope in the usual fashion and set the retriever; then with the tension from the retriever springs off the rope, he permitted

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it to slide slowly through his hands to bring the pole into contact with the power line; that suddenly the retriever operated, jerking the plaintiff between the two cars, injuring his back.

"Plaintiff alleges that the retriever was defective and that the defendant's failure to keep the said retriever in a safe condition for his use constituted a violation of the Federal Boiler Inspection Act (45 U. S. C. A., Sec. 23)."

To show the existence of the claimed defect Petitioner makes the following statements in his Statement of the Case (Pet. Br. 5):

"If the trolley were slowly permitted to ascend, then it is agreed that the retriever, if properly operating, should not retrieve (R. 49).

"Petitioner on the instance in question first pulled out the rope to rewind the retriever (R. 32). While resetting the trolley pole, and while permitting the rope to be played out in a slow manner, because of a defect in the retriever, the retriever suddenly operated, pulled petitioner between the two cars, severely injuring petitioner's back (R. 32). * * *"

The following language of the Illinois Appellate Court, to which Respondent has added references to the pages of the Record in this Court, shows the falsity of the above statements made by Petitioner with respect to the retriever (R. 18, 19):

"However, with respect to the existence of the alleged defect, certain undisputed facts were established by the evidence. Plaintiff himself testified that before the run back to Alton was started, he saw the motorman set the pole that plaintiff had left in the retrieved position under the hook on top of the car, and that he presumed the retriever was reset at that

time. (See: R. 44.) Further, on the cross-examination of the mechanical engineer who gave opinion evidence on plaintiff's behalf as to possible defects in the retriever which would cause it to retrieve unexpectedly, it was stated that these same defects would prevent the retriever from operating normally [fol. 26] at all. (See: R. 52.) Yet the evidence shows that the retriever operated normally before and after the incident complained of. (See: R. 31, 44.) In order for the retriever to have retrieved the trolley pole when it jumped the line going to the depot, it must have been in good working order; again, when the motorman reset the retriever and placed the pole on the hook before the return trip to Alton, the retriever operated normally. These facts to be gathered from plaintiff's evidence, in our view, appear more favorable to the defendant than to the plaintiff. The evidence further showed that what happened to plaintiff on this occasion had happened to him and to others from time to time without the retriever having been defective. (See: R. 42, 44, 53, 58.) The burden rested on plaintiff to show that on this occasion a defect existed and that it proximately caused his injury. With respect to the alleged defect, it is clear from all the evidence that this burden of proof was not satisfied. The inference of a defect arising from plaintiff's circumstantial evidence is manifestly outweighed by the showing that the retriever worked normally before and after the incident and by the other evidence in the record."

It is particularly to be noted that Petitioner is a conductor on the interurban electric cars operated by Respondent (R. 30) and was familiar with and had operated retrievers during the entire six-year period of 1944-1950 (R. 31, 43); that it is the duty of the conductor to change the trolleys and to set the retrievers at the end of each

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hourly run between St. Louis, Missouri, and Alton, Illinois, and to also set such retrievers, at times, during the course of the trip (R. 31, 43); that Petitioner, himself, testified on direct examination:

> (R. 32)—I let the rope back into the retriever because the pole was up and when I got the pole down to where I could set it on the wire, and for some reason it caught and rewound and when it did it yanked me in between the cars. Then it was just like someone hit me and I had a terrible pain all the way down my head and back and sickening. I tried to pull it out and I couldn't. I was sick and felt like vomiting, and I reached over the coupler with my other hand and set the other pole up and proceeded into the station. You have to set these retrievers very slowly because after you have used them you know what they will do. You know they will jerk your head off if you don't watch them. You have to work with them cautiously and slowly and carefully, but I was working slowly because I knew if I worked fast or any other way that it would retrieve.

and that he testified on cross-examination as follows:

> (R. 43)—In the operation of the streetcar on numerous occasions I operated the retriever and oper-[fol. 73] ated the particular retriever on this streetcar on other occasions. I have had this situation happen to me on other occasions, on several occasions. I wouldn't give you a definite number of times, that is silly, I could give you an estimate, but it is silly to say it happened to me 10 times if I can't say it would be more than 10 times, but it would be a number of times, not to me only, but to everybody. During my daily run, the number of times that I would handle a retriever would depend on the run. The conductor changes trolleys at each end of the run. He pulls one

down and puts the other one up, and during the course of the trip you may loose it once, may not loose it at all, and may loose it a half a dozen times. And on other occasions this thing has happened. I knew the normal operation of the retriever, and if you pull the rope out real quickly it would trip, it has happened to me that by pulling out the rope real fast that it trips on me. On occasions that this would happen, sometimes it would wind itself up and you start to reset it you are ducked away while you are pulling it. All of a sudden it will take you on in. It is supposed to work on a ratchet. This particular experience that I have had has happened on other streetcars besides car 123 and with other retrievers.

(R. 44)—I was pulling the pole up slowly when it slipped again and the pole came down the trolley. When it tripped it pulled me along and I held onto it. This was the same thing that has happened to me on other occasions.

The Petitioner also states (Pet. Br. 8):

> Defendant's witness Elder, who weighed 190 pounds, admitted that the retriever when tripped pulled with such force as to pull him into the car before he could let go (R. 55).

This statement is wholly untrue, as pages 55-59 of the Record will show. On this issue Mr. Elder actually said (R. 58): "The retriever has not jerked me in the course of resetting it and pulling it and I have set the retriever more than the conductors have."

Raymond Phillips, a motorman employee (R. 53), stated that:

> I have had occasion in my work to work with retrievers and trolleys. I am familiar with the normal operation of them and I have had occasion to be hold-

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ing on the rope on the trolley and have it retrieve. I weigh about 150 pounds. When you are holding on the rope, if you are not careful, it will carry you right in. I would just as soon let loose of that rope if I am not able to hold it. I am able to hold it if I put a stout grip on it; in other words, if I brake [break] myself.

James LeRoy Green, a conductor employee for about 7½ years (R. 59), said (R. 61), "I have had occasions when those retrievers have tripped. They have quite a bit of tingle of the springs, I have had them pull me in before I could let go."

In order to create the false impression that the incident in question in this cause created an "emergency" situation, Petitioner says (Pet. Br. 5): "This pole was setting the opposite direction for the then forward motion of the car, and the car was backed into the tunnel against the pole, a situation used only in case of emergency (R. 32)." This statement entirely overlooks the testimony of motorman Charles Elder that (R. 56) "it didn't make a bit of difference" and that (speaking of the subway at the St. Louis, Missouri, Depot)—(R. 57) "We run our cars in the subway like that down there. We don't run our main lines that way, we do in that subway, we back any way we want to. I recommend backing against the pole; we do that down there. I change the poles. The train end of the car was in the subway. It wouldn't make a bit of [fol. 122] difference about resetting the poles, he didn't have anything to explain or didn't tell me anything or I didn't ask him anything."

The full pertinent testimony of Petitioner's mechanical engineer witness, part only of which is quoted on page 22 of his Brief on Merits, is as follows (R. 51, 52):

"Mr. Chapman: Q. Now, if the retriever, Mr. Kline, were to go into operation after it had been set on slow

pulling out of the rope and retriever what, in your opinion, would be the cause of the defect, might or could cause that situation?

Mr. Schuman: That is objected to, for the same reason, asking for pure conclusion.

Mr. Chapman: I think not. He qualified as an expert and he examined it.

The Court: He may give his opinion as an expert.

A. My opinion is that the paw mechanism would be some fault in the paw mechanism. There would be several reasons why it would cause it not to work properly. The main [fols. 85-96] reason would probably be where the teeth would probably be worn to a point where it would slip this dog out, which would cause it to retrieve. There are several small springs involved in this that would cause it to retrieve without any warning.

Q. And could there be a defect in one of those springs; is that what you are saying?

A. Yes, sir; there could be a defect in one of those springs, or it would slip out.

Cross-Examination.

I am a mechanical engineer at the American Steel Foundry, and my title there is special engineer. I do all type of research work. On August 20, 1951, was the first time I had ever seen a retriever on a streetcar. At the time of the operation of the retriever, I used a rope and had it fastened in a vise. I couldn't pull it up or down. It would be a normal operation, but not in a normal position, the way I had it, as to the way it worked on a streetcar. I have never worked on a retriever on a streetcar, and the retriever I saw there was a Paul Warren.

Q. And were the springs broken?

A. No, sir.

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Q. Now, **if any of these things you call mechanical defects were in operation in this particular mechanism would it work normally and operate normally,** if this particular thing you testified about, if the paw were worn and springs broken, would it work normally at all?

A. No, sir." (Emphasis supplied.)

Petitioner's reference (Pet. Br. 6) to a Report of his injury "which was placed in evidence as Petitioner's Exhimit I," without the record reference required by Rule 40 (2) of this Court, is wholly improper, since such Exhibit does not appear in the Record of this cause in this Court. Respondent requests this Court to disregard such improper statement and the "self-serving" conclusions drawn by the Petitioner therefrom.

SUMMARY OF ARGUMENT.

1. The jurisdiction of this Court in this Federal Boiler Inspection Act cause can be invoked only if the law of Illinois has deprived the Petitioner of a substantial Federal right. The only claimed Federal right asserted by Petitioner is that the Illinois Appellate Court deprived him of a substantial Federal right of trial by jury in remanding this cause for a new trial before another jury, because the verdict of the jury for the Petitioner was against the manifest or clear weight of the evidence on the issue of a defective retriever, after such Illinois Appellate Court had found that Petitioner's evidence, taken as true, had sufficient probative force to require all the issues to be submitted to the jury, so that a directed verdict or judgment n. o. v. would not lie.

The Seventh Amendment to the Constitution of the United States does not apply to Federal Act state court proceedings, is not in issue in this cause and has not been invoked by Petitioner. Section 5 of Article II of the Illinois Constitution, however, preserves the same common law right of trial by jury, even though Illinois is not required so to do.

The Illinois Appellate Court, in reversing this cause and remanding the same for a new trial, preserved to Petitioner the right of trial by jury. Petitioner elected to forego and waive this right to a new jury trial and, under the governing Illinois Statute (This Brief 5), voluntarily moved the Illinois Appellate Court to strike the portion of its judgment remanding this cause for a new trial, so that the Illinois Supreme Court and this Court could review the resulting and then final Illinois Appellate Court judgment. It was, therefore, Petitioner's own actions and conduct and not Illinois law that deprived him of a trial by jury.

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In **Corcoran v. City of Chicago**, 373 Ill. 567, 27 N. E. 2d 451, which presented the identical procedural matters involved in this cause, the Illinois Supreme Court held that the Illinois Statute (This Brief 6), under which the Illinois Appellate Court remanded this cause for a new trial, did not violate the right of jury trial guaranteed by said Section 5 of Article II of the Illinois Constitution.

And in **Corcoran v. City of Chicago**, 311 U. S. 610, 85 L. Ed. 386, rehearing denied 311 U. S. 727, 85 L. Ed. 473, this Court dismissed the appeal of such case "for want of a properly presented substantial Federal question," citing, with seven of its other decisions, **Minneapolis & St. L. R. Co. v. Bombolis**, 241 U. S. 211, 217, 60 L. Ed. 961, 963. This controlling **non-Federal** question is not even raised by Petitioner.

Respondent, therefore, contends that this cause presents no Federal question at all, much less a "substantial" Federal question which will invoke the jurisdiction of this Court.

Moreover, the writ of certiorari herein is improperly addressed to the Illinois Supreme Court and should be dismissed for lack of jurisdiction.

2. The Petitioner relies only upon directed verdict and judgment n. o. v. decisions, in arguing that the Illinois Appellate Court erred in remanding this cause for a new trial. This fallacious contention makes it necessary for Respondent to briefly point out the following elementary principles of law, uniformly followed in the Federal and Illinois Courts:

> (a) That in passing upon a defendant's motion for a directed verdict or judgment n. o. v. the Court cannot consider the credibility of witnesses or the weight and probative value of the evidence, but must consider

such evidence in its aspect and light most favorable to plaintiff, with all conflicts in evidence resolved in his favor.

(b) That in passing upon a defendant's motion for a new trial the Court has the right and duty to consider the credibility of witnesses and the weight and probative value of the evidence and to determine whether the verdict of the jury is against the weight of the evidence.

An appreciation and acceptance of these elementary principles by the Petitioner would have materially shortened this Brief and expedited the disposition of this cause.

3. The remand of this cause for a new trial by the Illinois Appellate Court was a matter of local procedure governed entirely by Illinois law (Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 60 L. ed. 961).

4. Under Illinois law and by the common law, courts exercising appellate jurisdiction have the power to remand a cause for a new trial, where the verdict of the jury is against the weight of the evidence.

5. The settled rule of this Court is that it and the Circuit Courts of Appeal have the power to remand a cause for a new trial where the record shows a plain abuse of discretion by the Federal Trial Judge or a finding of fact wholly unsupported by the evidence.

The Courts of Appeal for the Third, Fourth, Fifth, Sixth, Seventh and Ninth Circuits and for the District of Columbia have squarely held that they have the power to review an abuse of discretion by a Federal Trial Judge in refusing a new trial. In several of these cases this Court has denied certiorari (This Brief 54).

Respondent is of the firm opinion that the case at bar, on the issues presented to this Court, is governed entirely

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by Illinois law. However, the above Federal rule is argued out of an abundance of caution.

6. The Illinois Appellate Court properly found that the verdict of the jury was against the manifest or clear weight of the evidence on the issue of a defective retriever. And this Court has repeatedly said that it will not review non-Federal findings of fact, but will accept the conclusion of the state tribunal as final.

7. If this Court determines that Federal rules of procedure govern this cause then the Illinois Appellate Court deprived the Respondent of a substantial Federal right by its refusal to require the Petitioner to submit to a physical examination.

ARGUMENT.

I.

Want of a Substantial Federal Question and Lack of Jurisdiction.

A.

This Cause Does Not Present a Substantial Federal Question Which Invokes the Jurisdiction of This Court.

The Seventh Amendment to the Constitution of the United States applies only to Federal Court proceedings (Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 217, 60 L. ed. 961, 963; Brady v. Southern R. Co., 320 U. S. 476, 479, 88 L. ed. 239, 242). However, the Illinois Constitution (Section 5 of Article II) preserves the right of trial by jury as it existed at the common law. (Corcoran v. City of Chicago, 373 Ill. 567, 575, 27 N. E. 2d 451, appeal dismissed 311 U. S. 610, 85 L. ed. 386, rehearing denied 311 U. S. 727, 85 L. ed. 473; Reese v. Laymon [1954], 2 Ill. 2d 614, 618). Illinois, therefore, gives to an F. E. L. A. or Federal Boiler Inspection Act plaintiff, suing in its Courts, the same right of common law jury trial given by said Seventh Amendment, although it is not required so to do.

At common law courts of original jurisdiction and courts **exercising appellate jurisdiction** were both authorized to set aside jury verdicts and to grant or order a new trial on the ground that the findings of fact of such juries were not supported by the evidence. And the exercise of such power and authority was not in derogation of the right of trial by jury as it existed at common law.

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Illinois decisions:

Corcoran v. City of Chicago, 373 Ill. 567, 575-580, 27 N. E. 2d 451, appeal dismissed 311 U. S. 610, 85 L. ed. 386, rehearing denied 311 U. S. 727, 85 L. ed. 473—reviews common law authorities, cites and quotes (pp. 577-578) **Bright v. Eynon** (King's Bench, 1757), 1 Burrows, 391, and cites (p. 580) **Smith v. Times Publishing Co.**, 178 Pa. St. 481, 36 Atl. 297;

Olson v. Chicago Transit Authority, 1 Ill. 2d 83, 85, 86.

Federal decisions:

Aetna Casualty & Surety Co. v. Yeatts (4 Cir., 1941), 122 F. 2d 350, 352-354 Parker, J.), citing Felton v. Spiro (6 Cir.), 78 F. 576;

Virginian Ry. Co. v. Armentrout (4 Cir., 1948), 166 F. 2d 400, 408 (Parker, J.);

Garrison v. United States (4 Cir., 1932), 62 F. 2d 41, 42 **citing: Felton v. Spiro** (C. C. A. 6th), 78 F. 576; Mt. Adams & E. P. Inclined R. Co. v. Lowery (C. C. A. 6th), 74 F. 463;

Felton v. Spiro (6 Cir., 1897), 78 F. 576.

Section 92 (3) (b) of the Illinois Civil Practice Act* [Ill Rev. Stat. 1953, Ch. 110, par. 216 (3) (b)], giving the Illinois Appellate Courts the power to review "Error of fact, in that the judgment, decree or order appealed from is not sustained by the evidence or is against the weight of the evidence," merely codifies and re-states the above common law rule as it applied to common law courts exercising appellate jurisdiction and does not violate the Illinois Constitution [Corcoran v. City of Chicago, 373 Ill. 567, 580, 27 N. E. (2d) 451; Mabee v. Sutliff & Case Co., 404 Ill. 27, 88 N. E. (2d) 769].

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* Quoted page 6 of this Brief.

In the **Corcoran** case, supra, 373 Ill. 567, the Illinois Supreme Court stated the Illinois constitutional question there presented in the following language:

> p. 569—"It is conceded the power which the Appellate Court assumed to exercise in reviewing the evidence and setting aside the verdict is found in section 92 (3b) of the Civil Practice Act (Ill. Rev. Stat. 1939, chap. 110, par. 216) which provides that Appellate Courts may review 'error of fact, in that the judgment, decree or order appealed from is not sustained by the evidence or is against the weight of the evidence.' Plaintiff's position is that such provision, as applied to facts found by a jury upon conflicting evidence, as in the instant case, is unconstitutional, in that the findings of the Appellate Court deprive the successful party of the benefits of the verdict and take from him the right to a trial by jury as guaranteed by section 5 of article 2 of the constitution."

and thus stated the real **non-Federal** question involved in this cause. This real non-Federal question was not even presented to the Illinois Supreme Court in Petitioner's Petition for Leave to Appeal (R. 1-14), or in his Petition for Writ of Certiorari in this Court (Pet. 2), or in his Brief on Merits in this Court (Br. 3), and it is the settled rule of this Court that **even a Federal question**, constitutional or otherwise, must be presented to the State Court before it will be reviewed and considered by this Court. (White River Lumber Co. v. Arkansas, 279 U. S. 692, 700, 73 L. ed. 903, 911; Hiawassee River Power Co. v. Carolina-Tennessee Power Co., 252 U. S. 341, 344, 64 L. ed. 601, 605; Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, 53, 59 L. ed. 127, 128).

Moreover, since the Seventh Amendment to the Constitution of the United States does not apply to state court proceedings (Pearson v. Yewdall, 95 U. S. 294, 296, 24 L.

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ed. 436, 437; Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 217, 60 L. ed. 961, 963; Brady v. Southern R. Co., 320 U. S. 476, 479, 88 L. ed. 239, 242). Petitioner could not properly have raised a Federal constitutional right to jury trial question even if he had wanted to.

Respondent stresses that the **Corcoran** case, supra, 373 Ill. 567, presents the identical non-Federal procedural matters involved in this cause, i. e., (1) the Illinois Appellate Court, under the identical governing statute (this Brief 6), remanded for a new trial because the verdict of the jury was against the manifest weight of the evidence and (2) the plaintiff in that case voluntarily moved the Illinois Appellate Court, under the identical governing Illinois Statute (this Brief 5), to strike the portion of its judgment remanding that cause for a new trial, so that the Illinois Supreme Court and this Court could review the resulting and then final Appellate Court judgment in that cause.

In **Corcoran v. City of Chicago**, 311 U. S. 610, 85 L. ed. 386, rehearing denied 311 U. S. 727, 85 L. ed. 473, this Court dismissed the appeal of the **Corcoran** case, supra, from the Illinois Supreme Court "for want of a properly presented substantial Federal question," citing, with seven of its other decisions, the **Bombolis** case, supra, 241 U. S. 211, 217, 60 L. ed. 961, 963. For the same reason this Court should dismiss the writ of certiorari issued in this cause.

B.

The Writ of Certiorari Herein Is Improperly Addressed to the Illinois Supreme Court and Should Be Dismissed for Lack of Jurisdiction.

Additional reason for the dismissal of this cause is the fact that, contrary to long and well-settled practice, the writ of certiorari herein is addressed to the Supreme Court

of Illinois, not to the Illinois Appellate Court, Fourth District, whose decision is sought to be reviewed.

Under 28 U. S. C., Sec. 1257, the jurisdiction of this Court to review by certiorari decisions of state courts is limited to "final judgments or decrees rendered by the highest court of a State in which a decision could be had."

Under Section 75 of the Illinois Civil Practice Act* (Ill. Rev. Stat. 1953, Ch. 110, Par. 199) a final judgment of the Illinois Appellate Court, such as the final judgment there entered in this cause, is reviewable only by petition to the Illinois Supreme Court for leave to appeal (formerly petition for writ of certiorari), which such Supreme Court may, in its discretion, allow or deny (it was denied in this cause).

In **Minneapolis, etc., Ry. Co. v. Rock**, 279 U. S. 410, 73 L. ed. 766, this Court held that where the Supreme Court of Illinois denied a review of the Illinois Appellate Court judgment, the writ of certiorari from this Court runs to such Appellate Court as "the highest court in the state in which a decision could be had." Since the **Rock** case, supra, the practice has become firmly settled that when the Supreme Court of Illinois has denied leave to appeal, the Appellate Court is the court whose final judgment is sought to be reviewed, and the writ of certiorari from this Court must be directed to the Appellate Court. **Lilly v. Grand Trunk W. Ry. Co.**, 317 U. S. 481, 87 L. ed. 411; **Chicago & N. W. Ry. Co. v. Margevich**, 75 S. Ct. 84, 99 L. ed. (Adv. Sheet No. 1), p. 46; **Emick v. Baltimore & O. R. Co.**, 340 U. S. 831, 95 L. ed. 611; **Killian v. Pennsylvania R. Co.**, 338 U. S. 819, 94 L. ed. 497; **Cowher v. Pennsylvania R. Co.**, 338 U. S. 828, 94 L. ed. 503; **Thomson v. Sevier**, 317 U. S. 698, 87 L. ed. 558; **Helton v. Thomson**, 316 U. S. 688, 86 L. ed. 1760. This is also the settled practice upon certiorari by this Court to other states having intermediate

* Quoted page 5 of this Brief.

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appellate courts, with a discretionary review by the Supreme Court of the state. See the cases cited in notes 18 and 19 to 28 U. S. C. A., Sec. 1257.

Here the judgment of the Illinois Appellate Court as originally entered, reversed the judgment in Petitioner's favor and remanded this cause for a new trial (R. 21, folio 149). That judgment, not being final, was not subject to further review, either by the Supreme Court of Illinois or by this Court. **Lees v. Chicago & N. W. Ry. Co.**, 409 Ill. 536, 541; **Avance v. Thompson**, 323 U. S. 753, 89 L. ed. 603. Instead of trying his case before another jury, and remedying any deficiencies in his proof, as he might have done without losing any right to review any properly preserved federal question presented by the first appeal, **Urie v. Thompson**, 337 U. S. 163, 93 L. ed. 1282, plaintiff **on his own motion**, under said governing Illinois Statute (this Brief 5), obtained an order of the Illinois Appellate Court striking said remanding clause, thus making the judgment of that court final for purposes of further review (R. 68). The Illinois Supreme Court's discretionary denial of the petition for leave to appeal from that judgment merely confirms that the Illinois Appellate Court was "the highest court of the state in which a decision could be had."

Petitioner's error in seeking a writ of certiorari to the Supreme Court of Illinois (which neither entered the final judgment nor decided the case on its merits) is not merely a procedural irregularity; it is a fatal jurisdictional defect. This Court squarely so held in **Randall v. Board of Commissioners**, 261 U. S. 252, 67 L. ed. 637. In that case the Appellate Court of Indiana affirmed the judgment of the trial court, and the Supreme Court of Indiana denied a petition to transfer, procedurally the same as the Illinois petition for leave to appeal. **Randall v. Board of Commissioners**, 77 Ind. App. 320, 131 N. E. 776. This Court dismissed a writ of error to the Supreme Court of Indiana on the ground that "clearly, it should have been to the State

Appellate Court." To the same effect are **Western Union Telegraph Co. v. Priester**, 276 U. S. 252, 258, 72 L. ed. 555, 564, and **Chesapeake & O. Ry. Co. v. Kuhn**, 284 U. S. 44, 76 L. ed. 157, where writs of certiorari to the state supreme courts were dismissed under similar circumstances, and **Second Nat'l Bank v. First Nat'l Bank**, 242 U. S. 600, 61 L. ed. 518; **Michigan-Wisconsin Pipe Line Co. v. Calvert**, 347 U. S. 157, 160, 98 L. ed. 583, 588.

The petition for writ of certiorari herein "to review the judgment of the Supreme Court of the State of Illinois, entered in this case on March 10, 1954" (Pet., p. 1), which is merely the order denying leave to appeal (R. 69), seeks a review of an order which is not a final judgment, and seeks a writ directed to a court in which a decision could **not** be had, since that court, in its discretion, had refused to consider and decide this case. Respondent submits this Court has no jurisdiction of this cause under 28 U. S. C. 1257 and the writ of certiorari herein should be dismissed for lack of jurisdiction. To hold otherwise is to disregard both the clear provision of the Judicial Code and the long-established precedents governing certiorari procedure.

II.

Distinction Between the Rule Governing the Granting of a Directed Verdict or Judgment n. o. v. and the Rule Governing the Granting of a New Trial.

Petitioner persists in citing and arguing "directed verdict" and "judgment n. o. v." decisions, instead of the pertinent "new trial" decisions, in contending that the Illinois Appellate Court deprived him of a substantive [substantial] Federal right, in remanding the case at bar for a new trial, because the verdict of the jury was against the manifest weight of the evidence, after it had found that Petitioner had made a submissible jury case, so that a directed verdict or judgment n. o. v. would not lie. For this reason

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a review of the settled principles of law governing such matters is necessary.

a. **Rule Governing Directed Verdicts and Judgments n. o. v.**

The settled rule of this Court (Baltimore & O. R. Co. v. Groeger, 266 U. S. 521, 524, 69 L. ed. 419, 422, 45 S. Ct. 169; Chicago, M. & St. P. R. Co. v. Coogan, 271 U. S. 472, 478, 70 L. ed 1041, 1045; Gunning v. Cooley, 281 U. S. 90, 94, 74 L. ed. 720, 724; Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 343, 77 L. ed. 819, 824, 825; Montgomery Ward & Co. v. Duncan, 311 U. S. 243, 251, 85 L. ed. 147, 152, 153, 61 S. Ct. 189) governing "directed verdicts" is stated in the **Groeger** case, supra, in the following language:

p. 524 of 266 U. S., p. 422 of 69 L. ed.:

"The credibility of witnesses, the weight and probative value of evidence, are to be determined by the jury, and not by the judge. However, many decisions of this court establish that, in every case, it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding."

and in the **Chamberlain** case, supra, in the following language:

p. 343 of 288 U. S., pp. 824, 825 of 77 L. ed.:

. . . "It repeatedly has been held by this court that before evidence may be left to the jury, 'there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' Pleasants v. Fant, 22 Wall.

116, 120, 121, 22 L. ed. 780, 782. And where the evidence is 'so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury.' Gunning v. Cooley, 281 U. S. 90, 94, 74 L. ed. 720, 724, 50 S. Ct. 231; Patton v. Texas & P. R. Co., 179 U. S. 658, 660, 45 L. ed. 361, 363, 21 S. Ct. 275. The rule is settled for the federal courts, and for many of the state courts, that whenever in the trial of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the judge to direct the jury to find according to the views of the court. Such a practice, this court has said, not only saves time and expense, but 'gives scientific certainty to the law in its application to the facts and promotes the ends of justice.' (Citations omitted.) The scintilla rule has been definitely and repeatedly rejected so far as the federal courts are concerned." (Citations omitted.)

The same rule prevails in the Federal Courts of Appeal (Burcham v. J. P. Stevens & Co., 4 Cir., 1954, 209 F. 2d 35, 37; Snead v. New York Central Railroad Company, 4 Cir., 1954, 216 F. 2d 169, 172; Swift & Co. v. Morgan & Sturdivant, 5 Cir., 1954, 214 F. 2d 115, 116; Pearl Assurance Co. v. Southern Wood Products Co., 5 Cir., 1954, 216 F. 2d 135, 138; Lloyd v. Thomas, 7 Cir., 1952, 195 F. 2d 486, 489; Willits v. Yellow Cab Co., 7 Cir., 1954, 214 F. 2d 612, 615; State of Washington v. United States, 9 Cir., 1954, 214 F. 2d 33, 40, 41), and a most complete statement of such Federal rule is found in the last-cited case of **State of Washington v. United States.**

The true Federal rule governing motions for judgments n. o. v., as distinguished from the Federal rule governing new trials, is concisely stated in the recent F. E. L. A. case of **O'Day v. Chicago River & Indiana Railroad Com-**

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pany, 216 F. 2d 79, decided by the Seventh Circuit Court of Appeals on November 13, 1954. In that case the District Court had rendered a judgment n. o. v. for the defendant railroad because the Trial Judge believed the (p. 82) "Plaintiff's story was fantastic. He impressed the Court as anything but a truthful witness." The Court of Appeals reversed such judgment n. o. v. (p. 83) "with directions that it be vacated, without prejudice, however, to the right of the District Court to rule upon defendant's motion for a new trial," for the reason that on considering a motion for judgment n. o. v. the jury (p. 82) "was the judge of the credibility of the witnesses, not the court." The Court stated the rule governing judgments n. o. v. in the following language:

> p. 82—"The rule is well established that a motion for a judgment notwithstanding the verdict presents **only a question of law** as to whether, when all the evidence is considered together with all reasonable inferences most favorable to plaintiff, there is a total failure or lack of evidence to prove any necessary element of plaintiff's case. Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497; Sivert v. Pennsylvania R. Co., 7 Cir., 197 F. 2d 371, 375; Marsh v. Illinois Central R. Co., 5 Cir., 175 F. 2d 498, 499; Bonnier v. Chicago, B. & Q. R. Co., 2 Ill. 2d 606, 607-608, 119 N. E. 2d 254. The Federal Employers' Liability Act makes a carrier liable in damages for any injury or death 'resulting in whole or in part from the negligence' of any of its 'officers, agents, or employees.'"

This case clearly holds that in passing upon a motion for judgment n. o. v. the Court cannot weigh the evidence or judge the credibility of witnesses, but recognizes that in passing on a motion for a new trial the Court has the duty to weigh the evidence and judge the credibility of witnesses.

The same rule prevails in the Illinois Supreme Court (Wiik v. Hagen, 410 Ill. 158, 161; Lake v. Seiffert, 410 Ill. 444, 448). And that Court, in **Pitrowski v. N. Y. C. & St. L. R. R. Co.**, 4 Ill. 2d 125, decided November 15, 1954, in reversing the First District Appellate Court, because it had held that the Trial Court erred in refusing to direct a verdict for the defendant railroad in a F. E. L. A. case, and in remanding the cause with directions to consider other errors not considered upon the initial review of the case, summarized the pertinent F. E. L. A. decisions of this Court.

In the very recent F. E. L. A. case of **Bonnier v. C. B. & Q. R. R. Co.** (1954), 2 Ill. 2d 606, the same Court said:

> pp. 607-608—"The well-established rule in both the Federal courts and the courts of Illinois is that a motion for judgment notwithstanding the verdict presents **only a question of law** as to whether, when all the evidence is considered, together with all reasonable inferences therefrom in its aspect most favorable to the plaintiff, there is a total failure or lack of evidence to prove any necessary element of plaintiff's case. (**Wilkerson v. McCarthy**, 336 U. S. 53, 93 L. ed. 497; **Lindroth v. Walgreen Co.**, 407 Ill. 121; Ill. Rev. Stat. 1951, chap. 110, par. 259.22)."

And in **Williams v. N. Y. Central R. R. Co.**, 402 Ill. 494, decided in 1949, the same court, in reaching the conclusion that the same First District Appellate Court had erroneously entered a directed verdict judgment in favor of the defendant railroad, in a suit brought under the F. E. L. A. (45 U. S. C. A., Sec. 51, et seq.) and the Federal Safety Appliance Act (45 U. S. C. A., Secs. 1-16), thoroughly reviewed (pp. 500-508) the F. E. L. A. decisions of this Court.

The foregoing F. E. L. A. decisions clearly show that the Illinois Supreme Court is fully aware of and has fol-

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lowed the decisions of this Court governing the review of directed verdicts in F. E. L. A. cases.

The same rule as to directed verdicts also prevails in the Fourth District Appellate Court which reviewed this cause (Heimsoth v. Falstaff Brewing Corp. (1953), 1 Ill. App. 2d 28, 30; Walton v. Greenberg Merc. Corp. (1953), 1 Ill. App. 2d 99, 101), and even a cursory examination of its decisions in **Robson v. Pennsylvania R. Co.** (1949), 337 Ill. App. 557, 572-575 (quoting and following Williams v. New York Central R. Co., 402 Ill. 494), and in **Robertson v. Louisville & N. R. Co.** (1945), 327 Ill. App. 44, 52, 53, shows that it, also, is fully aware of and has followed the decisions of this Court governing the review of directed verdicts in F. E. L. A. cases.

b. **Rule Governing New Trials.**

In **Montgomery Ward & Co. v. Duncan**, 311 U. S. 243, 85 L. ed. 147, 61 S. Ct. 189, this Court, in discussing the distinction between a motion for a judgment n. o. v. and a motion for a new trial, said:

p. 251 of 311 U. S., p. 153 of 85 L. ed.:

"Each motion, as the rule recognizes [Rule 50 (b), F. R. C. P.], has its own office. The motion for judgment cannot be granted unless, as matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim **that the verdict is against the weight of the evidence**, that the damages are excessive, or that, for other reasons, **the trial was not fair to the party moving;** and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury." (Emphasis supplied.)

In **Snead v. New York Central Railroad Company,** 4 Cir., 1954, 216 F. 2d 169, that Court, speaking through Chief Judge Parker, made the same distinction in the following language:

> p. 172—" 'It is well settled that on a motion for a directed verdict or on motion for judgment n. o. v. based on such motion, the evidence must be considered in the light most favorable to the party against whom the directed verdict or the judgment n. o. v. is asked, that any conflict in evidence must be resolved in his favor and that every conclusion or inference that can be legitimately drawn therefrom in his behalf must be drawn.' Burcham v. J. P. Stevens & Co., 4 Cir., 209 F. 2d 35, 37. The rule differs from that applicable on motions for new trial, where the judge may and should set aside the verdict and grant a new trial where the verdict is contrary to the weight of the evidence, or in his opinion is based upon evidence that is false or where he thinks such action necessary to prevent a miscarriage of justice. We pointed out the distinction in Garrison v. United States, 4 Cir., 62 F. 2d 41, 42, from which we quoted in the later cases of Roedegir v. Phillips, 4 Cir., 85 F. 2d 995, 996, and Aetna Casualty & Surety Co. v. Yeatts, 4 Cir., 122 F. 2d 350, 354, as follows:
>
> "Where there is substantial evidence in support of plaintiff's case, the judge may not direct a verdict against him, even though he may not believe his evidence or may think that the weight of the evidence is on the other side; for, under the constitutional guaranty of trial by jury, it is for the jury to weigh the evidence and pass upon its credibility. He may, however, set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence, or is based upon evidence which is false; for, even though the evidence be suf-

ficient to preclude the direction of a verdict, it is still his duty to exercise his power over the proceedings before him to prevent a miscarriage of justice. See Felton v. Spiro, 6 Cir., 78 F. 576. Verdict can be directed only where there is no substantial evidence to support recovery by the party against whom it is directed or where the evidence is all against him or so overwhelmingly so as to leave no room to doubt what the fact is. Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720. Verdict may be set aside and new trial granted, when the verdict is contrary to the clear weight of the evidence, or whenever in the exercise of a sound discretion the trial judge thinks this action necessary to prevent a miscarriage of justice." . . .

p. 173—"If the judge is of opinion that the verdict of the jury was against the weight of the evidence or based on evidence that was false, he should set it aside and grant a new trial, even though direction of a verdict or judgment n. o. v. was not warranted." . . .

c. **Summary.**

The foregoing "directed verdict" and "judgment n. o. v." decisions of this Court, of the Federal Courts of Appeals and of the Illinois Supreme and Appellate Courts make it clear that, in determining whether the Petitioner herein had made a submissible case for the jury, so that a directed verdict or judgment n. o. v. should not have been entered, the Trial Judge and the Illinois Appellate Court had no right to pass upon the "credibility of witnesses" or "the weight and probative value of evidence" (Baltimore & O. R. Co. v. Groeger, 266 U. S. 521, 524, 69 L. ed. 419, 422, 45 S. Ct. 169); and that Petitioner's evidence had to "be considered in the light most favorable to" [him], "that any conflict in evidence [had to] be resolved

in his favor and that every conclusion or inference that [could] be legitimately drawn therefrom in his behalf [was to] be drawn" (Snead v. New York Central Railroad Company, 4 Cir., 1954, 216 F. 2d 169, 172).

However, the foregoing "new trial" authorities make it equally clear that in determining the Respondent's right to a new trial such Illinois Trial Judge and such Illinois Appellate Court had the clear right and duty to pass upon the credibility of witnesses and the weight and probative value of the evidence and to determine whether the verdict of the jury was against the weight of the evidence (Montgomery Ward & Co. v. Duncan, 311 U. S. 243, 251, 85 L. ed. 147, 153; Snead v. New York Central Railroad Company, 4 Cir., 1954, 216 F. 2d 169, 172; Aetna Casualty & Surety Co. v. Yeatts, 4 Cir., 1941, 122 F. 2d 350, 352-354).

The opinion of the Appellate Court in the case at bar shows that such Court fully understood and carefully followed the foregoing principles of law, for in its infrequent "Supplement to Opinion on Denial of Petition for Rehearing" it first said (R. 21, pp. 282-283 of 351 Ill. App.):

> "On petition for rehearing plaintiff contests, for the first time, the power of a reviewing court to consider the weight of the evidence in F. E. L. A. cases and to reverse and remand a judgment as against the manifest weight of the evidence. It is contended that once such court determines that there is sufficient evidence in the record to support submitting the issues to a jury, it has exhausted its function with respect to weighing the judgment against the evidence. Numerous cases are cited and relied upon, principally, Lavender v. Kurn, 327 U. S. 645, 90 L. Ed. 916; Ellis v. Union Pacific Railroad Co., 329 U. S. 649, 91 L. Ed. 572; Tennant v. Peoria & Pekin Union Railway Co., 321 U. S. 29, 88 L. Ed. 520; Williams v.

New York Central Railroad, 402 Ill. 494, 84 N. E. 2d 399; Nickell v. B. & O. R. Co., 347 Ill. App. 202, 106 N. E. 2d 738. **All of these cases deal with the questions of directed verdicts or judgments notwithstanding the verdicts and not with the reversal and remandment on the ground of a verdict against the manifest weight of evidence.**" (Emphasis supplied.)

and, in rejecting such contention, then said (R. 21, 22, pp. 282-283 of 351 Ill. App.):

"The opinion of the court in the case at bar notes the fact that the evidence of an incident occurring and injury therefrom was highly contradicted but that these issues relate to the credibility of witnesses and were decided by the jury in plaintiff's favor. Such finding, therefore, was not disturbed. On the issue of the existence of a defective appliance, this court did not weigh conflicting evidence, consider the credibility of the various witnesses, nor follow what is considered a more reasonable inference. It considered only undisputed facts and circumstances. These facts were not susceptible of varying inferences but constitute a manifest weight of evidence in opposition to the claim of a defective or unsafe retriever. (fol. 30-38) Plaintiff has cited no authority, and we find none, which **removes the reviewing court's historical power to reverse and remand a case for new trial when it believes the verdict to be against the manifest weight of the evidence.** The cases cited do illustrate the reluctance of the reviewing courts to disturb findings on issues that are based on credibility of witnesses. We find in these authorities, however, no such restrictive rule of law as urged by plaintiff." (Emphasis supplied.)

From the above-quoted language it is obvious that on the issue of the existence of a defective retriever the Ap-

pellate Court did not find it necessary to weigh "conflicting evidence, consider the credibility of the various witnesses, nor follow what it considered a more reasonable inference" but that it "considered only undisputed facts and circumstances" which "were not susceptible of varying inferences but constituted a manifest weight of evidence in opposition to the claim of a defective or unsafe retriever" (R. 22).

It is also significant that petitioner raised this question only after such Appellate Court had reversed and remanded for a new trial; and that in this Court, also, he has cited no authority "which removes the reviewing court's historical power to reverse and remand a case for new trial when it believes the verdict to be against the manifest weight of the evidence" (R. 22).

III.

The Appellate Court Had the Power to Remand the Case at Bar for New Trial Under the Settled Illinois Law Governing This Cause.

Before citing and discussing the Illinois and Federal authorities and rules governing appellate review of judgments and orders granting and refusing new trials it is to be noted that under Illinois law (**Ogdon v. Gianakos**, 415 Ill. 591, 595, 596, 114 N. E. (2d) 686; **Parthun v. Elgin, J. & E. Ry. Co.** (1st, 1945), 325 Ill. App. 408, 411, 60 N. E. [2d] 464, **appeal denied**, 326 Ill. App. xv) and under Federal law (**Aetna Casualty & Surety Co. v. Yeatts**, 4 Cir., 1941, 122 F. 2d 350, 352; **Kaufman v. Atlantic Greyhound Corp.**, D. C. S. D. W. Va., 1941, 41 F. Supp. 252, 254) the granting or refusing of a new trial is a matter of procedure and the last-cited Federal cases also squarely hold that Federal courts are not in any way subject to the rules of state practice governing new trials.

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The Illinois Supreme Court has heretofore, in effect, ruled on the point under discussion by its denial of leave to appeal, 326 Ill. A. xv, in the case of **Parthun v. Elgin, J. & E. Ry. Co.** (1945), 325 Ill. A. 408, 60 N. E. (2d) 464, wherein the First District Appellate Court, in squarely holding that it had the right, **under the governing state practice,** to grant a new trial in a F. E. L. A. case, said:

> p. 411—"Defendant contends here that the verdict is excessive, and against the manifest weight of the evidence. Plaintiff claims that this court is bound by the decisions of the Federal Courts in cases of this kind and has no authority to weigh the evidence. Under Section 56 of the F. E. L. A. Act, plaintiff had the right to sue in a Federal District Court or in a State Court. Miles v. Ill. Cen. R. R. Co., 315 U. S. 698. **Having chosen courts of this State, he must prosecute his action in accordance with our modes of procedure** (Minn. & St. Louis R. R. Co. v. Bombolis, 241 U. S. 211), and we have authority to weigh the evidence to determine whether the verdict should stand or whether it should be set aside and the cause retried. [Chap. 110, Par. 216, sub-par. (3) b, Ill. Rev. Stats.] [Jones' Ill. Stats. Ann., 104,092, subpar. (3) b.] (Corcoran v. City of Chicago, 373 Ill. 567; and Mitchell v. L. & N. R. R. Co., 375 Ill. 545.) **In Tennant v. Peoria & Pekin Union Railway Co., 321 U. S. 29, relied upon by plaintiff, suit was filed in a Federal District Court and the case is, therefore, not applicable."** (Emphasis supplied.)

In **Minneapolis & St. L. R. Co. v. Bombolis,** 241 U. S. 211, 60 L. Ed. 961, 36 S. Ct. 595, decided without dissent in 1916, this Court, in holding that States in entertaining actions under the Federal Employers' Liability Act need not provide a jury system other than that established for local negligence actions and that a Minnesota statute per-

mitting a non-unanimous jury verdict in such actions did not violate the Seventh Amendment, first pointed out that such Seventh Amendment applied only to Federal Court proceedings and then said:

241 U. S., at 218, 60 L. Ed., at 963, 964:

> "And it was, of course, presumably an appreciation of the principles so thoroughly settled which caused Congress, in the enactment of the employers' liability act, to clearly contemplate the existence of a concurrent power and duty of both Federal and state courts to administer the rights conferred by the statute **in accordance with the modes of procedure prevailing in such courts.**" (Emphasis supplied.)

In **Dice v. Akron, C. & Y. R. Co.**, 342 U. S. 359, 96 L. Ed. 398, 72 S. Ct. 312, a judgment n. o. v. case, the majority opinion by Mr. Justice Black indicates that the majority of this Court did not intend to modify, reverse or retreat from such **Bombolis** case. The minority opinion by Mr. Justice Frankfurter in such **Dice** case points out that (342 U. S., at 365, 96 L. Ed., at 405): "In the thirty-six years since this early decision after the enactment of the Federal Employers' Liability Act, 35 Stat. 65 (1908), the Bombolis case has often been cited by this Court but never questioned," in reaching the conclusion that (342 U. S., at 367, 96 L. Ed. 406) "Although a State must entertain negligence suits brought under the Federal Employers' Liability Act if it entertains ordinary actions for negligence, **it need conduct them only in the way in which it conducts the run of negligence litigation.**" (Emphasis supplied.)

In **Brady v. Southern R. Co.**, 320 U. S. 476, 88 L. Ed. 239, a directed verdict F. E. L. A. case, this Court cited the **Bombolis** case in again pointing out that a state court was not required to provide a Seventh Amendment jury for the trial of F. E. L. A. cases.

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In **Brown v. Gerdes**, 321 U. S. 178, 88 L. Ed. 659, a state court bankruptcy reorganization case involving the right to fix attorney fees, the concurring opinion by Mr. Justice Frankfurter cites the **Bombolis** case and collects the other authorities in reviewing the question here in issue:

321 U. S., at 188-191, 88 L. Ed., at 665-667:

"... In short, subject to only one limitation, each State of the Union may establish its own judicature, distribute judicial power among the courts of its choice, define the conditions for the exercise of their jurisdiction and the modes of their proceeding, to the same extent as Congress is empowered to establish a system of inferior federal courts within the limits of federal judicial power, and the States are as free from control by Congress in establishing state systems for litigation as is Congress free from state control in establishing a federal system for litigation. The only limitation upon the freedom of a State to define the jurisdiction of its own courts is that implied by Article 4, § 2 of the Constitution, whereby 'The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.' ... The matter was well put by Judge Cuthbert Pound in connection with litigation under the Federal Employers' Liability Act in the state courts: 'The State courts must make no hostile discrimination against litigants who come within the act in question; ... they must treat litigants under the Federal act as other litigants are treated; ... they are to act in conformity with their general principles of practice and procedure and are not to deny jurisdiction merely because the right of action arises under the act of Congress.' Murnan v. Wabash R. Co., 246 N. Y. 244, 247, 158 N. E. 508, 54 A. L. R. 1522. ...

"Whether a state court is 'competent to decide rights of the like character and class,' whether the

particular litigation is to be tried by jury and, if so, how the jury is to be composed, whether it is to be a jury of twelve or less, whether decision is to be by unanimity or majority, whether security is to be furnished and of what nature—in sum, whether a state court can take jurisdiction and what the incidents of the litigation should be—all these are matters wholly within the control of the State creating the court and without the power of Congress. See, for instance, Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 60 L. Ed. 961, 36 S. Ct. 595, L. R. A. 1917A 86, Ann. Cas. 1916E 505. As it was put by Mr. Justice Story in Martin v. Hunter, 1 Wheat. (U. S.) 304, 330, 331, 4 L. Ed. 97, 103, 104, 'Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself.' Congress may avail itself of state courts for the enforcement of federal rights, but it must take the state courts as it finds them, subject to all the conditions for litigation in the state courts that the State has decreed for every litigant who seeks access to its courts. . . .

"The simple fact is that from 1789 to this day no act of Congress has attempted to force upon state courts the duty of enforcing any right created by federal law on terms other than those on which like litigation involving rights other than federal rights is required to be conducted in a state court."

In **Stein v. New York**, 346 U. S. 156, 97 L. Ed. 1522, 73 S. Ct. 1077, a criminal case, this Court, in its majority opinion, again cited the **Bombolis** case in stating that (346 U. S., at 179, 97 L. Ed., at 1539) "The states are free to allocate functions as between judge and jury as they see fit."

In **Brown v. Western Railway of Alabama**, 338 U. S. 294, 94 L. ed. 100, this Court held that a strict local (Georgia)

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rule of pleading could not be invoked so as actually to deprive a F. E. L. A. plaintiff of his right to trial by jury. In **Dice v. Akron, C. & Y. R. Co.**, 342 U. S. 359, 96 L. ed. 398, this Court held that a local (Ohio) rule of practice could not be invoked to deprive a F. E. L. A. plaintiff of his right to have a jury pass on all of the issues of fraud in the procurement of a release.

In **Urie v. Thompson**, 337 U. S. 163, 172, 93 L. ed. 1282, 1294, this Court held that a local (Missouri) rule of practice could not be invoked so as to deprive this Court of its "independent consideration of all substantial federal questions actually determined in earlier stages of the litigation by the court whose final adjudication is brought here for review."

In the **Urie** case, supra, the Supreme Court of Missouri remanded a state court F. E. L. A. and Boiler Inspection Act case for a new trial (as the Illinois Appellate Court did the instant Boiler Inspection Act cause) and the plaintiff in that case went back to the Missouri Trial Court for a new trial before another jury (a course the Petitioner herein voluntarily elected not to follow). This Court then, on certiorari, reviewed the second appeal to the Supreme Court of Missouri and, in so doing, considered a Federal question presented only on the first appeal, on the ground that the plaintiff could not be **forced** in such first appeal to (p. 172 of 337 U. S., pp. 1293, 1294, of 93 L. ed.) "ask for final judgment to be entered against him on the general negligence issue, and rely solely upon securing review of that judgment and reversal by this Court," in order to preserve his right to have this Court pass upon such Federal question on its review of the second appeal.

In the case at bar the Petitioner chose not to submit to another jury trial (as did the **Urie** case plaintiff), but voluntarily asked for final judgment to be entered against him in the Illinois Appellate Court and relied solely upon se-

curing review and reversal of such final judgment in the Illinois Supreme Court or in this Court.

In the case at bar the Illinois procedure gave the Petitioner herein a new trial **before another jury** and clearly preserved to him his right of trial by jury, and it was **his own voluntary and affirmative act** in causing the Appellate Court to strike out (R. 68) the portion of its judgment remanding this cause for a new trial, **and not Illinois law,** that deprived him of a trial by jury.

Moreover, various members of this Court have joined in pointing out, in varying language, that state courts need conduct F. E. L. A. litigation only in the way in which they conduct the run of other negligence litigation, so long as they treat F. E. L. A. litigants as other non-Federal litigants are treated and make no hostile discrimination against such litigants. "After all, the Federal Courts are always available." (See Minority opinion, **Dice v. Akron, C. & Y. R. Co.,** 342 U. S. 359, 367, 96 L. ed. 398, 406; Concurring opinion, **Brown v. Gerdes,** 321 U. S. 178, 188-191, 88 L. ed. 659, 665-667; Dissenting Opinion, **Brown v. Western Railway of Alabama,** 338 U. S. 294, 299, 300, 94 L. ed. 100, 104.)

The Petitioner herein voluntarily chose and elected to sue in the Illinois Circuit Court and he does not even argue that the Illinois Courts have discriminated against him or treated him in a hostile manner. He has been treated as all other non-Federal litigants are treated and he is not entitled to more than this (Herb v. Pitcairn, 324 U. S. 117, 120, 123, 89 L. ed. 789, 791, 793; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.), 223 U. S. 1, 56, 57, 56 L. ed. 327, 349; McKnett v. St. Louis & S. F. R. Co., 292 U. S. 230, 234, 78 L. ed. 1227, 1229).

It is, therefore, respectfully submitted that the case at bar presents a matter of procedure governed by Illinois

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law (Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 60 L. ed. 961, 36 S. Ct. 595; Parthun v. Elgin J. & E. Ry. Co. [1945], 325 Ill. App. 408, 60 N. E. [2d] 464, appeal denied 326 Ill. App., xv); and that the writ of certiorari herein should be dismissed.

Such writ of certiorari should be dismissed for the further reason that in **Corcoran v. City of Chicago,** 311 U. S. 610, 85 L. ed. 386, rehearing denied 311 U. S. 727, 85 L. ed 473, this Court squarely recognized that the two identical Illinois Statutes (This Brief, 5, 6) now in issue in this cause presented matters of pure local (Illinois) procedure, by its dismissal of the appeal of such cause, supra, 373 Ill. 567, 27 N. E. 2d 451, "for want of a properly presented substantial Federal question. (See: This Brief, 22-25.)

IV.

Federal Courts of Review Have the Power and Duty to Remand a Cause for a New Trial Where the Verdict of the Jury Is Against the Clear or Manifest Weight of the Evidence.

Counsel for Respondent are of the firm opinion that the case at bar is governed by Illinois law. However, the Federal authorities on the power and duty to grant and remand for a new trial will be discussed in some detail.

It is here to be noted that Petitioner has cited no authorities, Federal or otherwise, on the power and duty of a Federal Court of Review to remand a cause for new trial where the verdict of the jury is against the clear or manifest weight of the evidence.

A. Rule at Common Law.

It is the settled rule of this Court that the Seventh Amendment to the Constitution of the United States ap-

plies only to Federal Court proceedings (Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 217, 60 L. ed. 961, 963; Brady v. Southern R. Co., 320 U. S. 476, 479, 88 L. ed. 239, 242) and in **Capital Traction Co v. Hof**, 174 U. S. 1, 43 L. ed. 873, this Court defined "Trial by jury" in the following language:

174 U. S., at 13, 14, 43 L. ed., at 877, 878:

> "III. 'Trial by jury,' in the primary and usual sense of the term at the common law and in the American Constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion. Yet there are unequivocal statements of it to be found in the books."

In **People v. Traeger**, 372 Ill. 11, 22 N. E. 2d 679, the Illinois Supreme Court defined "Trial by jury" in the following language:

> "The right of trial by jury has been jealously guarded by the courts and there are many decisions in this and other States and in the Federal courts defining the essential elements of a jury trial as guaranteed by constitutional provisions. In **Sinopoli v. Chicago Railways Co.**, supra, this court said: 'The essential thing in the right of trial by jury is the right to

have the facts in controversy determined **under the direction and superintendence of a judge** by twelve impartial jurors having the qualifications and selected in the manner required by law, whose verdict must be unanimous and shall be conclusive, **subject to the right of the judge to set it aside if in his opinion it is against the law or the evidence and to grant a new trial.'** In **People v. Kelly**, supra, we said that the essential elements of a trial by jury were (1) twelve (2) impartial (3) qualified jurors who should (4) unanimously decide the facts in controversy (5) **under the direction and superintendence of a judge.** See **Liska v. Chicago Railways Co.**, 318 Ill. 570; **Lommen v. Minneapolis etc. Co.**, 65 Minn. 196, 68 N. W. 53; **State v. Norton**, 64 N. D. 675, 255 N. W. 787." (Emphasis supplied.)

At the common-law courts of original jurisdiction and courts **exercising appellate jurisdiction** were both authorized to grant a new trial where the verdict of a jury was not supported by the evidence and, for brevity, such authorities are not here repeated (this Brief 23).

B. Power and Duty of Federal Trial Judge.

In **Capitol Traction Co. v. Hof**, supra, 174 U. S. 1, 13, 14, 43 L. ed. 873, 877, 878, this Court said that the Trial Judge was empowered to set aside the verdict of the jury "if in his opinion it is against the law or the evidence," and in **Montgomery Ward & Co. v. Duncan**, 311 U. S. 243, 251, 85 L. ed. 147, 153, 61 S. Ct. 189, it is said that the "motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence . . ." Rule 59, Fed. Rules Civ. Proc., provides that Federal Trial Courts may grant a new trial "for any of the reason for which new trials have heretofore been granted in actions at law in the courts of the United States."

The Federal Courts have consistently and uniformly held (**Charles v. Norfolk & Western Ry. Co.**, 7 Cir., 1951, 188 F. 2d 691, 695, certiorari denied 342 U. S. 831, 72 S. Ct. 55, 96 L. ed. 628; **Daffinrud v. United States**, 7 Cir., 1944, 145 F. 2d 724, 725; **Aetna Casualty Co. v. Yeatts**, 4 Cir., 1941, 122 F. 2d 350, 352-354; **General Accident, Fire & Life Assur. Corp. v. Dickinson**, D. C. N. D. Cal., N. D., 1945, 61 F. Supp. 153, 156; **Kaufman v. Atlantic Greyhound Corp.**, D. C. S. D. W. Va., 1941, 41 F. Supp. 252, 254) that Rule 59 makes it the duty of the Federal Trial Judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, even though there may be substantial evidence which would prevent the direction of a verdict.

The above-cited case of **Aetna Casualty & Surety Co. v. Yeatts**, 4 Cir., 1941, 122 F. 2d 350, is apparently the leading Federal case on the power and duty of the Federal Court Trial Judge to grant a new trial where the verdict of the jury is against the clear weight of the evidence. For this reason and the further reason that the Petitioner's Brief herein cites and discusses "directed verdict" law instead of "new trial" law, we will quote the following from this most pertinent decision:

> pp. 352-353—"The motion to set aside the verdict and grant a new trial was a matter of federal procedure, governed by Rule of Civil Procedure 59 and not subject in any way to the rules of state practice. On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. The exercise of this power is not in derogation of the right of trial by jury but is

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one of the historic safeguards of that right. Smith v. Times Pub. Co., 178 Pa. 481, 36 A. 296, 35 L. R. A. 819; Bright v. Eynon, 1 Burr. 390; Mellin v. Taylor, 3 B. N. C. 109, 132 Eng. Reports 351. The matter was well put by Mr. Justice Mitchell, speaking for the Supreme Court of Pennsylvania in Smith v. Times Publishing Co., supra (178 Pa. 481, 36 A. 298), as follows: 'The authority of the common pleas in the control and revision of excessive verdicts through the means of new trials was firmly settled in England before the foundation of this colony, and has always existed here without challenge under any of our constitutions. It is a power to examine the whole case on the law and the evidence, with a view to securing a result, not merely legal, but also not manifestly against justice—a power exercised in pursuance of a sound judicial discretion, **without which the jury system would be a capricious and intolerable tyranny,** which no people could long endure. This court has had occasion more than once recently to say that it was **a power the courts ought to exercise unflinchingly.**' (Emphasis suppplied.)"

The Court then exhaustively reviewed the authorities, tracing the history of the above power back to 1665 and to the Magna Charta, and then quoted the language it later quoted in **Snead v. New York Central Railroad Company**, 216 F. 2d 169, 172 (this Brief 34-35).

The **Yeatts** case, supra, 122 F. 2d 350, has been uniformly followed on the rule that the Federal Trial Judge has the duty to set aside a verdict and grant a new trial where such verdict is against the clear weight of the evidence, even though there may be substantial evidence which would prevent the direction of a verdict. See:

Dyer v. MacDougall, 2 Cir., 1952, 201 F. 2d 265, 271, 272, in concurring opinion of Frank J., in pointing

out distinction between rules governing "directed verdicts" and "new trial," particularly on the judging of the "credibility" of witnesses.

Dickerson v. Franklin Nat. Ins. Co. of New York, 4 Cir. 1942, 130 F. 2d 35 (Parker, J.) judgment n. o. v. under F. R. C. P. 50 (b) can be granted (p. 37) "only where the motion for directed verdict should have been allowed";

Hawkins v. Sims, 4 Cir., 1943, 137 F. 2d 66 (Per Curiam)—points out above distinction between rules on 'directed verdict' and on 'new trial'; and that judgment n. o. v. cannot be granted (p. 67) "except where motion for directed verdict has been made, and then only where the motion for directed verdict should have been granted, i. e., where there is no substantial evidence to support the verdict";

Railway Exp. Agency v. Mallory, 5 Cir., 1948, 168 F. 2d 426, 427—stating rule on "directed verdicts" and "judgment n. o. v.," **Dissenting opinion** by Sibley, J., reviews common law rule, as stated in prior Federal cases, on power and duty of Trial Judge to grant a new trial **even on his own motion** and on remand by court of review where he fails so to act in a proper case;

Reno Sales Co. v. Pritchard Industries, 7 Cir., 1950, 178 F. 2d 279, 281—states rule on motion for directed verdict;

Atlantic Greyhound Corporation v. Eddins, 4 Cir., 1949, 177 F. 2d 954, 955—states rule on reviewing jury verdict approved by Trial Judge;

General American Life Ins. Co. v. Central Nat. Bank, 6 Cir., 1943, 136 F. 2d 821, 822—quotes **Montgomery Ward & Co. v. Duncan**, 311 U. S. (page 251), 61 S. Ct., page 194, 85 L. Ed. 147, on function of motion for new trial, distinguishes between such

motion and a motion for directed verdict and states party is entitled to Trial Judge ruling on both motions.

C. Power and Duty of Federal Reviewing Court.

The foregoing authorities conclusively establish the principle of law that a Federal Court trial judge has the power and **absolute duty** to award a new trial where the verdict of the jury is against the clear weight of the evidence, as the Illinois Appellate Court has held to be the case in this cause (R. 18, 19, 351 Ill. App. 283, 114 N. E. [2d] 898).

The next question presented is: Does a Federal Reviewing Court have the power to reverse and remand for a new trial where such Federal Court trial judge has failed and refused to perform his absolute duty to grant a new trial?

This question was answered in the affirmative by the Fourth Circuit Court of Appeals in the case of **Virginian Ry. Co. v. Armentrout** (1948), 166 F. 2d 400. In that case such court, speaking through Judge Parker, first pointed out that this was the second appeal (p. 401) "in the distressing case of the infant whose hands and portions of whose arms were cut off by a backing locomotive" and that in the first appeal it had awarded a new trial (p. 401) "for errors in the charge of the court." (See 158 F. 2d 358.)

The court then discussed the facts to show that an award of $160,000 to a child who was 13 months old at the time of injury was excessive, reviewed (p. 408) the authorities on the well-established power and duty of the trial judge to grant a new trial and then said:

> pp. 408-409—"The power of this court to reverse the trial court for failure to exercise the power, where

such failure, as here, amounts to an abuse of discretion, is likewise clear. It is true that under Section 22 of the Judiciary Act of 1789, 28 U. S. C. A. No. 879, there may be no reversal on writ of error for any error in fact; and this rule has been frequently applied where reversal is sought because damages are excessive or inadequate. Fairmont Glass Works v. Cub Fork Coal Co., 287 U. S. 474, 53 S. Ct. 252, 77 L. Ed. 439. We do not understand the rule to have application, however, **in those exceptional circumstances where the verdict is so manifestly without support in the evidence that failure to set it aside amounts to an abuse of discretion.** In a situation of that sort, **reversal is no more based on 'error in fact' than reversal for refusal to direct a verdict for insufficiency of evidence.** Whether there has been an abuse of discretion **is a question of law in the one case, just as is the legal sufficiency of the evidence in the other.** An Appellate court **is not required to place the seal of its approval upon a judgment vitiated by an abuse of discretion.** . . ." (Emphasis supplied.)

"That abuse of discretion in refusing to set aside a verdict is an exception to the rule that the granting or refusing of a new trial is not assignable as error, is definitely recognized in the following decisions: Detroit Transfer Co. v. Pratt, 6 Cir., 2 F. 2d 193; Carter Coal Co. v. Nelson, 4 Cir., 91 F. 2d 651, 654; Western Union Tel. Co. v. Dismang, 10 Cir., 106 F. 2d 362, 364; Southern Fruit Distributors v. Fulmer, 4 Cir., 107 F. 2d 456, 459. In the case of Carter Coal Co. v. Nelson, supra (91 F. 2d 654), this court, speaking through Judge Soper, said: 'The established rule in the federal appellate courts is that they have no power to review the action of a trial court in granting or denying a motion for a new trial for error of fact. Such a matter lies wholly within the discretion of the trial court and **it is only when there is an abuse of such discre-**

tion that its action is reviewable.' (Emphasis supplied.)"

"For the reasons stated, the judgment appealed from will be reversed and the cause will be remanded for a new trial."

In **Commercial Credit Corp. v. Pepper** (1951), 187 F. 2d 71, the Fifth Circuit Court of Appeals followed the **Virginian Ry. Co.** case, supra, 166 F. 2d 400, in reversing and remanding for a new trial, and in the course of its opinion said:

pp. 75-76—"Under the circumstances presented, and quite independent of the error in the charge, we are of opinion that the trial court erred in denying plaintiff's motion for a new trial. It is a principle well recognized in the federal courts that the granting or refusing of a new trial is a matter resting within the discretion of the trial court. The term 'discretion,' however, when invoked as a guide to judicial action, means a sound discretion, exercised with regard to what is right and in the interest of justice. And an appellate court is not bound to stay its hand and place its stamp of approval on a case when it feels that injustice may result. Quite to the contrary, it is definitely recognized in numerous decisions that an abuse of discretion is an exception to the rule that the granting or refusing of a new trial is not assignable as error.

"Upon the record before us, we hold that it was an abuse of discretion to deny plaintiff's motion for a new trial."

The other courts of appeal have also uniformly followed such **Armentrout** case, supra, 166 F. 2d 400, on the proposition and rule that the Federal Appellate Courts have the power and duty to set aside verdicts and order new trials where the Federal Trial Judges have abused their discretion in not granting such new trials. See:

Southern Pac. Co. v. Guthrie, 9 Cir., 1949, 180 F. 2d 295, 303, 306—on rehearing, 9 Cir., 186 F. 2d 926, **certiorari denied**, 341 U. S. 904, 71 S. Ct. 614, 95 L. ed. 1343—**F. E. L. A. case**—$100,000 verdict for plaintiff not so grossly excessive as to constitute abuse of discretion—**See** p. 305 on faulty reasoning on historical limitation of writ of error to matters within record, of which the motion for a new trial was not a part;

Boyle v. Bond, App. D. C. 1950, 187 F. 2d 362, 363—reversed for new trial, if no remittitur filed, because excessive verdict "technically, constituted an abuse of discretion amounting to an error of law";

Sunray Oil Corporation v. Allbritton, 5 Cir., 1951, 187 F. 2d 475—**see extended dissenting opinion** (right to order remittitur of excessive verdict) **rehearing denied**, 188 F. 2d 751—**see** extended dissenting opinion;

Mayer v. Higgins, 7 Cir., 1953, 208 F. 2d 781, 783;

and there are many other cases announcing such proposition and rule wherein this Court has denied certiorari. See:

Charles v. Norfolk & Western Ry. Co., 7 Cir., 1951, 188 F. 2d 691, 695, **certiorari denied** 342 U. S. 831, 96 L. ed. 628, 72 S. Ct. 55;

Somerville v. Capital Transit Co., App. D. C. 1951, 192 F. 2d 413, 414, 415, **certiorari denied**, 342 U. S. 941, 96 L. ed. 700, 72 S. Ct. 553;

Rash v. Peoples Deposit Bank & Trust Co., 6 Cir., 1951, 192 F. 2d 470, 471, **certiorari denied**, 343 U. S. 909, 96 L. ed. 1326, 72 S. Ct. 639;

Bucher v. Krause, 7 Cir., 1953, 200 F. 2d 576, 585-587—(Court has right to review discretion of trial judge on **excessive verdict**—points out old "procedural" impediment no longer bars judicial re-

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view), **certiorari denied,** 345 U. S. 997, 97 L. ed. 1404, 73 S. Ct. 1141, **rehearing denied,** 346 U. S. 842, 98 L. ed. 363, 74 S. Ct. 17;

Southern Pac. Co. v. Guthrie, 9 Cir., 1949, 180 F. 2d 295, 303-306, on rehearing, 9 Cir., 186 F. 2d 926, **certiorari denied,** 341 U. S. 904, 71 S. Ct. 614, 95 L. ed. 1343;

Fishbaugh v. Armour & Co., 4 Cir., 1950, 185 F. 2d 541, 542, certiorari denied 342 U. S. 914, 96 L. ed. 683, 72 S. Ct. 361, **rehearing denied,** 342 U. S. 950, 96 L. ed. 706, 72 S. Ct. 563.

Such rule and principle has been applied by the Courts of Appeal in determining whether such verdicts **were against the clear weight of the evidence (De Pascale v. Pennsylvania R. Co.,** 3 Cir., 1950, 180 F. 2d 825, 826, **F. E. L. A.** case—action of Trial Judge in denying new trial to **employee** affirmed; **Wisnewski v. Baltimore & Ohio R. Co.,** 3 Cir., 1950, 186 F. 2d 538, 541 (pedestrian case); **Norfolk Southern Ry. Co. v. Davis Frozen Foods,** 4 Cir., 1952, 195 F. 2d 662, 664—(suit against truck company for damage done to railroad bridge); Kirstner v. Atlantic Greyhound Corp., 4 Cir., 1951, 190 F. 2d 422, 423).

Even some of the authorities cited and quoted by the Petitioner in his Petition for Writ of Certiorari in this Court support the power of the Court of Appeals to remand for a new trial, for in the cited case (Pet. 14) of **Witherbee v. Elgin, Joliet & Eastern Ry. Co.** (1951), 191 F. 2d 302, the Seventh Circuit Court of Appeals remanded a F. E. L. A. case for a new trial, and in the cited case (Pet. 14) of **Stanczak v. Pa. Ry. Co.** (1949), 174 F. 2d 43, the same Court refused to grant a new trial in a F. E. L. A. and Safety Appliance Act case because there was no abuse of discretion by the Federal Trial Judge. And in the cited case (Pet. 14, 16) of **Grand Trunk Western Ry. Co. v. Heatlie** (1931), 48 F. 2d 759, the Sixth Circuit Court of Appeals also denied a new trial because there

was no abuse of discretion. The last-named **Heatlie** case is also cited at page 17 of Petitioner's Brief on Merits.

In **United States v. Socony-Vacuum Oil Co.**, 310 U. S. 150, 247, 248, 84 L. ed. 1129, 1180, 1181, this Court said that the granting or denying of a new trial for error of fact "is a matter within the discretion of the trial court," reviewable only by this Court and the Circuit Courts of Appeal for a plain abuse of such discretion. And in **United States v. Johnson**, 327 U. S. 106, 90 L. ed. 562, this Court, speaking through Mr. Justice Black, said, **327 U. S. at 111, 112, 90 L. ed. 565, 566:**

> ". . . But it is not the province of this Court or the Circuit Court of Appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact. Holmgren v. United States, 217 U. S. 509, 54 L. ed. 861, 30 S. Ct. 588, 19 Ann. Cas. 778; Holt v. United States, 218 U. S. 245, 54 L. ed. 1021, 31 S. Ct. 2, 20 Ann. Cas. 1138; Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474, 481, 77 L. ed. 439, 443, 53 S. Ct. 252. While the appellate court might intervene when the findings of fact are wholly unsupported by evidence, cf. United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 247, 84 L. ed. 1129, 1180, 60 S. Ct. 811; Glasser v. United States, 315 U. S. 60, 87, 86 L. ed. 680, 708, 62 S. Ct. 457, it should never do so where it does not clearly appear that the findings are not supported by any evidence. . . ."

The finding of the Trial Court on the existence of a defective retriever is "not supported by any evidence," as shown by the following language from the opinion of the Illinois Appellate Court (R. 18, 19):

> ". . . the evidence shows that the retriever operated normally before and after the incident com-

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plained of. In order for the retriever to have retrieved the trolley pole when it jumped the line going to the depot, it must have been in good working order; again, when the motorman reset the retriever and placed the pole on the hook before the return trip to Alton, the retriever operated normally. These facts to be gathered from plaintiff's evidence, in our view, appear more favorable to the defendant than to the plaintiff. The evidence further showed that what happened to plaintiff on this occasion had happened to him and to others from time to time without the retriever having been defective. The burden rested on plaintiff to show that on this occasion a defect existed and that it proximately caused his injury. With respect to the alleged defect, it is clear from all the evidence that this burden of proof was not satisfied. The inference of a defect arising from plaintiff's circumstantial evidence is manifestly outweighed by the showing that the retriever worked normally before and after the incident and by the other evidence in the record. It is, therefore, our conclusion from all the evidence that the jury finding of a violation of the Boiler Inspection Act is clearly against the manifest weight of the evidence. Robertson v. Louisville & N. R. Co., 327 Ill. App. 44, 63 N. E. (2nd) 608. . . . ."

In **Chicago G. W. R. Co. v. Rambo,** 298 U. S. 99, 80 L. ed. 1066, rehearing denied, 298 U. S. 692, 80 L. ed. 1409, a suit under the Federal Boiler Inspection Act (45 U. S. C. A., Sec. 23), based on the alleged failure of the defendant railroad to equip its locomotive with a headlight of the illuminating power required by Federal law, i. e.: a rule of the Interstate Commerce Commission, this Court reversed a judgment in favor of the plaintiff administratrix, because the evidence showed that such headlight worked properly and complied with said I. C. C. rule both **before** and **after** the accident and death there in issue. In reach-

ing its decision in that case this Court first quoted the appraisal of the evidence made by the Supreme Court of Minnesota in reaching its conclusion that the jury was justified "in finding that the headlight did not comply with the requirements of the Federal Boiler Inspection Act," which evidence showed "before" and "after" operation of said headlight, and then said, **298 U. S. at 102, 80 L. ed. at 1069:**

> "This apprizement of the evidence, we think, is not well founded. Properly interpreted, the record fails to establish that the headlight fell below the prescribed standard. The argument for respondent dwells too hard on conjecture. Atchison, T. & S. F. R. Co. v. Saxon, supra (284 U. S. 460, 76 L. ed. 399, 52 S. Ct. 229). . . ."

Under the authority of this decision of this Court the Illinois Appellate Court would have been justified, as a matter of Federal law, in reversing the Trial Court and entering judgment n. o. v. in favor of the Respondent railroad, as is hereinafter argued (This Brief 60, 63).

And if Federal law and the decisions of this Court, and not Illinois law as Respondent contends, controlled the right of the Illinois Appellate Court to remand this cause for a new trial before another jury, then such **Rambo** case, supra, 298 U. S. 99, 80 L. ed. 1066, 56 S. Ct. 693, shows the "plain abuse of discretion" and finding of fact "wholly unsupported by evidence" (United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 247, 248, 84 L. ed. 1129, 1180, 1181; United States v. Johnson, 327 U. S. 106, 111, 112, 90 L. ed. 562, 565, 566) required under the rule of this Court to give such Illinois Appellate Court the right to intervene and remand for such new trial.

D. Federal Rule and Illinois Rule Are Same.

Finally, we invite the attention of this Court to **Jennings v. Murphy** (1952), 194 F. 2d 35, wherein the Seventh Circuit Court of Appeals, in pointing out that the Federal rule and the Illinois rule governing the appellate review of orders granting or refusing new trials were the same, said:

> p. 38. ". . . Furthermore, granting or refusing a motion for a new trial rests within the sound discretion of the trial court and its ruling in this respect can not be disturbed on appeal in the absence of a showing of a manifest abuse of such discretion. There being, we think, absence of clear abuse of discretion, the judgment must be affirmed. Firestone Tire & Rubber Co. v. Nollman, 5 Cir., 107 F. 2d 146; Fyre v. Lyon, 55 App. D. C. 48, 299 F. 926. **The same rule abides in Illinois where this accident occurred and where the case was tried.** Couch v. Southern Railway, 294 Ill. App. 490, 14 N. E. 2d 266; Corcoran v. City of Chicago, 373 Ill. 567, 27 N. E. 2d 451." (Emphasis supplied.)

We ask this Court to note that in the Couch case, supra, 294 Ill. App. 490, 14 N. E. (2d) 266, the very same Fourth District Appellate Court reviewed and affirmed the order of the City Court of East St. Louis granting a new trial to the plaintiff in a death action brought under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51).

It is, therefore, respectfully submitted that if this Court is of the opinion that Federal law governs and controls this cause the Illinois Appellate Court had the clear right, power and duty to remand this cause for a new trial before another jury; and that the writ of certiorari herein should be dismissed or, in the alternative, the judgment of the Illinois Appellate Court should be affirmed.

V.

This Court Should Not Review the Findings of Fact Made by the Illinois Appellate Court. Such Findings, If Reviewed, Should Be Affirmed.

The Petitioner devotes pages 20-23 of his Brief on Merits to arguing that this Court, in the exercise of its supervisory powers on certiorari, should examine and weigh the evidence and reverse the finding of the Illinois Appellate Court that the verdict of the jury was against the manifest or clear weight of such evidence; and that Respondent was, therefore, entitled to a new trial before another jury.

To support this contention Petitioner again cites (Pet. Br. 24) **Lavender v. Kurn**, 327 U. S. 645, 90 L. Ed. 916, and **Tennant v. Peoria & Pekin Union Railway Co.**, 321 U. S. 29, 35, 88 L. Ed. 520, and refers this Court to other "quotations to this effect—not repeated for the sake of brevity." However, as said by the Illinois Appellate Court in its Supplemental Opinion in the case at bar (R. 21), "All of these cases deal with the questions of directed verdicts or judgments notwithstanding the verdicts and not with the reversal and remandment on the ground of a verdict against the manifest weight of the evidence," and Petitioner has cited no decisions of this Court holding that it has the right or duty to review and weigh such evidence and to reverse such findings of fact.

In **Chicago G. W. Ry. Co. v. Rambo**, 298 U. S. 99, 80 L. Ed. 1066, 56 S. Ct. 693, rehearing denied 298 U. S. 692, 80 L. Ed. 1409, 56 S. Ct. 945, heard on certiorari to the Supreme Court of Minnesota, this Court held that it would, on reviewing the judgment of a state court in an action under the F. E. L. A. (45 U. S. C. A., Secs. 51-59) and the Federal Boiler Inspection Act (45 U. S. C. A., Secs. 22-34), examine the record and determine for itself whether, **as a**

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matter of law, there was enough to sustain a finding of negligence and to justify the submission of such cause to a jury.

See also: **Chicago, M. & St. P. R. Co. v. Coogan,** 271 U. S. 472, 474, 70 L. Ed. 1041, 1044, reversing a judgment against defendant F. E. L. A. carrier.

In the very recent case of **Bonnier v. C. B. & Q. R. R. Co.** (1954), supra, 2 Ill. 2d 606, the Illinois Supreme Court, in reversing a judgment n. o. v. entered by the First District Appellate Court in favor of the defendant railroad in a F. E. L. A. case, extensively quoted (pp. 610-611) a Federal case (**Louisville and Nashville Railroad Co. v. Botts,** 8 Cir., 1949, 173 F. 2d 164, 166, 167) reviewing the decisions of this Court defining the right and power of trial and appellate courts, both Federal and State, to take F. E. L. A. cases from juries by means of directed verdicts and judgments n. o. v. and, in the course of its opinion, said:

> pp. 607-608—"The well-established rule in both the Federal courts and the courts of Illinois is that a motion for judgment notwithstanding the verdict presents **only a question of law** as to whether, when all the evidence is considered, together with all reasonable inferences therefrom in its aspect most favorable to the plaintiff, there is a total failure or lack of evidence to prove any necessary element of plaintiff's case (**Wilkerson v. McCarthy,** 336 U. S. 53, 93 L. Ed. 497; **Lindroth v. Walgreen Co.,** 407 Ill. 121; Ill. Rev. Stat. 1951, chap. 110, par. 259.22). Section 1 of the Federal Employers' Liability Act makes a carrier liable in damages for any injury or death 'resulting in whole or in part from the negligence' of any of its 'officers, agents, or employees.' Other provisions of the act abolish the defense of assumption of risk and provide that contributory negligence of a plaintiff shall not bar a recovery (45 U. S. C. 51, 53, and 54).

> Thus, the sole question presented on appellate review [by the Illinois Supreme Court] is whether there is any evidence, considered in the light most favorable to the plaintiff, that defendant was guilty of negligence which contributed in whole or in part to plaintiff's injury."

Respondent does not deny the right and duty of this Court to examine the facts and to weigh the evidence to determine whether a trial or appellate court, federal or state, has deprived a F. E. L. A. or Federal Boiler Inspection Act plaintiff of a substantial Federal right. Respondent does contend that this Court, under its settled rules (United Gas Public Service Co. v. Texas, 303 U. S. 123, 139, 143, 82 L. Ed. 702, 714, 715, 716, 717; Northern P. R. Co. v. North Dakota, 236 U. S. 585, 593, 59 L. Ed. 735, 740; Chrisman v. Miller, 197 U. S. 313, 319, 49 L. Ed. 770, 772; Young v. Ragen, 337 U. S. 235, 238, 93 L. Ed. 1333, 1336; Central Vermont R. Co. v. White, 238 U. S. 507, 509, 59 L. Ed. 1433, 1435; Great Northern R. Co. v. Donaldson, 246 U. S. 121, 124, 62 L. Ed. 616, 619; Milk Wagon Drivers U. v. Meadowmoor Dairies, 312 U. S. 287, 294, 85 L. Ed. 836, 841, 842; Norton Co. v. Department of Revenue, 340 U. S. 534, 538, 95 L. Ed. 517, 521), will not review non-Federal questions of fact or matters of state procedure, but will accept the conclusions of the state tribunal as final.

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds," [for the reason that this Court's] "only power over state judgments is to correct them to the extent they incorrectly adjudge federal rights" (Herb v. Pitcairn, 324 U. S. 117, 125, 89 L. Ed. 789, 794).

Section 92 (3) (b) of the Illinois Civil Practice Act* (Ill. Rev. Stat. 1953, ch. 110, par. 216) specifically provides that

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* Quoted page 6 of this Brief.

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the findings of fact of the Appellate Court on the weight of the evidence, in law actions, shall be final and binding on the Illinois Supreme Court, and such Court has squarely held that in law actions brought to it by appeal from the Appellate Court it "is restricted to re-examination as to questions of law only" (**Mabee v. Sutliff & Case Co.**, 404 Ill. 27, 32). (Accord: **Olson v. Chicago Transit Authority** [1953], 1 Ill. 2d 83, 89, 115 N. E. [2d] 301.)

If, however, this Court is of the opinion that it is not bound by the above Illinois statute and has powers of review not possessed by the Illinois Supreme Court and elects to review the facts in this cause, Respondent submits that the findings of the Illinois Appellate Court are correct as a matter of law and should be affirmed on the authority of Chicago G. W. R. Co. v. Rambo, 298 U. S. 99, 80 L. Ed. 1066, rehearing denied 298 U. S. 692, 80 L. Ed. 1409.

Moreover, Petitioner, to sustain a portion of his Argument in this Court (Pet. Br. 20-23), has ignored or evaded the findings of the Illinois Appellate Court, and has only partially quoted the Record in this cause.

The Illinois Appellate Court said, in pertinent part (R. 19), "The inference of a defect arising from plaintiff's circumstantial evidence is manifestly outweighed by the showing that the retriever worked normally before and after the incident **and by the other evidence in the record**" (emphasis supplied). Some of the "other evidence in the record," ignored by Petitioner, is the testimony of the Petitioner (R. 43, 44) and of two other employees (R. 53, 58) that, as found by the Illinois Appellate Court (R. 18), "what happened to plaintiff on this occasion had happened to him and to others from time to time **without the retriever having been defective**" (emphasis supplied). Also omitted by the Petitioner is the **complete** pertinent

questions asked of and answered by his alleged mechanical engineer on cross-examination, as follows (R. 52):

> Q. And were the springs broken?
>
> A. No, sir.
>
> Q. Now, **if any of these things you call mechanical defects were in operation in this particular mechanism would it work normally and operate normally,** if this particular thing you testified about, if the paw were worn and springs broken, would it work normally at all?
>
> A. No, sir. (Emphasis supplied.)

Also omitted by the Petitioner (Pet. Br. 21) is the **full** pertinent testimony of the Petitioner, himself, as it appears at Record page 44, as follows:

> After the passengers were discharged Mr. Elder pulled out the trolley and [fol. 75] pulled it underneath the hook and when he pulled it out he evidently set it. It doesn't necessarily have to be set when you put it under the hook. I presume he did reset it. I saw him pull it out.

Added by the Petitioner in his Statement of the Case is the following (Pet. Br. 8):

> Defendant's witness Elder, who weighed 190 pounds, admitted that the retriever when tripped pulled with such force as to pull him into the car before he could let go (R. 55).

This statement is wholly untrue, as pages 55-59 of the Record will show. Mr. Elder, on this issue, actually testified as follows:

> (R. 58)—The retriever has not jerked me in the course of resetting it and pulling it and I have set the retriever more than the conductors have.

Raymond Phillips, another employee, testified as follows:

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(R. 53)—I have had occasion in my work to work with retrievers and trolleys. I am familiar with the normal operation of them and I have had occasion to be holding on the rope on the trolley and have it retrieve. I weigh about 150 pounds. When you are holding on the rope, if you are not careful, it will carry you right in. I would just as soon let loose of that rope if I am not able to hold it. I am able to hold it if I put a stout grip on it; in other words, if I break myself.

James LeRoy Green, another conductor, testified that (R. 61):

> I have had occasions when those retrievers have tripped. They have quite a bit of tingle of the springs, I have had them pull me in before I could let go.

It is significant that even in his Statement of the Case (Pet. Br. 4-9), which he is duty-bound to present fairly and accurately, Petitioner does not state any of the above facts showing that a **normal** retriever will retrieve if it is not properly handled while being set for, as Petitioner himself testified (R. 43), "I knew the normal operation of the retriever, and if you pull the rope out real quickly it would trip, it has happened to me that by pulling out the rope real fast that it trips on me. . . . This particular experience that I have had has happened on other streetcars besides car 123 and with other retrievers."

The only evidence in this cause that even remotely touches on a possible defect in the retriever is Petitioner's unsupported statement that (R. 32)—"I let the rope back into the retriever because the pole was up and when I got the pole down to where I could set it on the wire, and **for some reason it caught and rewound** and when it did it yanked me in between the cars" (emphasis supplied).

Respondent, therefore, submits that, if this Court reviews the weight of the evidence in this cause, it should adopt the finding of the Illinois Appellate Court that (R. 19) "the jury finding of a violation of the Boiler Inspection Act is clearly against the manifest weight of the evidence" and affirm the now final judgment of that Court.

VI.

The Right of Physical Examination of a Plaintiff Is a Substantial Federal Right.

The right of a defendant to require a plaintiff in a personal injury suit to submit to a physical examination prior to trial is a substantial right and this court, in promulgating Federal Rule of Civil Procedure 35, has given this valuable right to Federal Court defendants. Illinois, however, denies such right of physical examination (**C. R. I. & P. Ry. Co. v. Benson**, 352 Ill. 195, 185 N. E. 244).

Respondent moved (R. 25-28) the Illinois Trial Court for a physical examination of Petitioner, as provided by said Rule 35, and its motion, as amended, was denied (R. 26). The Illinois Appellate Court affirmed (R. 19, 20) such Trial Court ruling on the ground that (R. 20) "The granting to State Courts of concurrent jurisdiction in F. E. L. A. cases does not require that a federal rule supplant the procedural law of a state."

If this Court should determine that the Illinois Appellate Court has deprived Petitioner of a substantial Federal right in remanding this cause for a new trial before another jury, a Federal procedural matter under said F. R. C. P. 59 and Federal law, then it should also determine that such Court deprived Respondent of a substantial Federal right in denying its motion, as amended, for a physi-

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cal examination of Petitioner and, if it remands this cause for a new trial, should grant to Respondent the right to a physical examination of Petitioner, as provided by F. R. C. P. 35.

CONCLUSION.

It is respectfully submitted that the writ of certiorari herein should be dismissed or, in the alternative, that the now final judgment of the Illinois Appellate Court should be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 125.

WAYNE HARSH,
Petitioner,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois.

RESPONDENT'S PETITION FOR REHEARING.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 125.

WAYNE HARSH,
Petitioner,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois.

RESPONDENT'S PETITION FOR REHEARING.

To the Honorable the Supreme Court of the United States:

Now comes Illinois Terminal Railroad Company, Respondent herein, and, pursuant to Rule 58, paragraph 1, of the Rules of this Court, files this, its Petition for Rehearing, urging the following grounds:

1. The Per Curiam judgment of reversal, entered February 14, 1955, deprives Respondent railroad of a trial by

jury according to the rules of the common law, is contrary to Section 2106 of 28 U. S. C., violates Section 5 of Article II of the Illinois Constitution of 1870 and violates the Seventh Amendment to the Constitution of the United States, if this Court is holding that such Seventh Amendment applies to and controls this cause.

2. The Writ of Certiorari herein is improperly addressed to the Illinois Supreme Court and should be dismissed for lack of jurisdiction.

3. This cause does not present a substantial Federal question which invokes the jurisdiction of this Court (Corcoran v. City of Chicago, 311 U. S. 610, 85 L. ed. 386, rehearing denied 311 U. S. 727, 85 L. ed. 473).

4. The Illinois Appellate Court had the power to remand this cause for a new trial before another jury under the settled Illinois law governing this cause (Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 60 L. ed. 961).

All of these points were urged and argued in Respondent's Brief on Merits. The Per Curiam judgment of this Court deciding this "new trial" cause solely on the authority of **Lavender v. Kurn**, 327 U. S. 645, a "demurrer to the evidence" case (See: Lavender v. Kurn, 354 Mo. 196, 189 S. W. 2d 253), decided at **the October term, 1945,** shows that this Court has overlooked or misapprehended every point urged by Respondent in its Brief on Merits, has decided this cause solely by applying **Federal** "directed verdict" law and has overlooked Section 2106 of 28 U. S. C., **enacted in 1948**, which provides as follows:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and **may remand the cause** and direct the entry of such appropriate judgment, decree, or order, **or require such**

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further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat. 963." (Emphasis supplied.)

and clearly authorizes Federal Appellate Courts to remand causes for new trial.

For these reasons Respondent will again attempt to point out that (I) the writ of certiorari herein is addressed to the wrong court and should be dismissed for lack of jurisdiction; and that (II) even under **Federal** law the Illinois Appellate Court had the power to remand this cause for a new trial **before another jury.**

In confining this Petition for Rehearing to such two points Respondent does not waive or abandon the two principles of law that actually control this cause under prior decisions of this Court, i. e.:

(a) That this cause does not present a substantial Federal question which invokes the jurisdiction of this Court (Corcoran v. City of Chicago, 311 U. S. 610, 85 L. ed. 386, rehearing denied 311 U. S. 727, 85 L. ed. 473—Respondent's Brief on Merits 22-25).

(b) That this cause presents only a matter of Illinois procedure governed entirely by Illinois law (Minneapolis v. St. L. R. Co. v. Bombolis, 241 U. S. 211, 60 L. ed. 961 —Respondent's Brief on Merits 38-45).

Because a correct determination of the real issues presented in the case at bar is of great importance to the Illinois Appellate Court that heard this cause, to the other state appellate courts that review F. E. L. A. and like Federal Act cases and to the Bench and Bar of this Country, Respondent respectfully requests this Court to permit it to make a somewhat extended discussion of Points I and II, supra. A discussion also proper because this Court has overlooked or misapprehended Respondent's entire argument in its Brief on Merits.

I.

The Writ of Certiorari Herein Was Improperly Issued to the Illinois Supreme Court and Should Be Dismissed for Lack of Jurisdiction.

The court either has misapprehended our point on lack of jurisdiction, or totally ignored our argument pertaining thereto which appears on pages 24, 26, 27 and 28 in Respondent's Brief on Merits.

That the Court has overlooked this vital point was made more apparent on oral argument when Justice Frankfurter in questioning counsel for Petitioner stated that the Court had the right to find the record wherever it may be physically lodged. The question presented here is not the right or ability of this Court to find and obtain the record once the Court has jurisdiction, but is rather the complete failure of jurisdiction in this Court, because the Illinois Supreme Court, to which the writ is directed, is not the Court in which final judgment was rendered by the highest court of a state in which a decision could be had.

It is not a question of where the record is, it being conceded that if the court has jurisdiction it could have a proper record brought to it wherever it could find it to determine questions that the court might deem proper in reviewing F. E. L. A. litigation.

This court obtains its jurisdiction under Section 28, U. S. C., Section 1257, and its jurisdiction to issue a writ of certiorari is limited to "**final judgment or decrees rendered by the highest court of a State in which a decision could be had.**"

It is admitted that the Appellate Court for the Fourth District of Illinois was the court which rendered the final judgment in this matter, which judgment was rendered under the procedural rules of Illinois. From this judgment of the Appellate Court Petitioner filed a Petition for

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Leave to Appeal to the Illinois Supreme Court, **which was denied** (Record 69).

The only portion of the record that is necessary to have this court determine the jurisdictional question is the denial of the petition for leave to appeal by the Illinois Supreme Court. This is shown at page 69 of the record.

Petitioner in his Reply Brief devoted pages 6 to 18 in discussing this jurisdictional question. On page 13 of Petitioner's Reply Brief he stated the following:

> "Where the Supreme Court of Illinois denied the Petition for Leave to Appeal, as it did in the instant case, the record and mandate of that Court, denying the petition, would have been returned to the Appellate Court for the Fourth District as a matter of course (as provided in Paragraph 259.32 of Chapter 110, Ill. Rev. Stat.) had not petitioner herein adopted a different procedure.
>
> "Had this situation occurred, then Respondent would have been correct in its contention that the writ should properly have issued to the Appellate Court for the Fourth District.
>
> "However, in the instant case, petitioner obviated this situation by also staying the mandate of the Supreme Court of Illinois until this petition for a writ of certiorari was determined by this Court."

It is submitted that under said Illinois Supreme Court Rule 32 (Ill. Rev. Stat. 1953, Ch. 110, Par. 259.32), the Supreme Court of the State of Illinois, on denying a Petition for Leave to Appeal, had no authority to stay any mandate, nor was any mandate required to send the case back to the Appellate Court. This rule specifically provides as follows:

> "(1) The party applying in the Supreme Court for Leave to Appeal from an Appellate Court shall file a petition therefor in the Supreme Court, stating therein

> the reasons and grounds of appeal. The clerk of the Supreme Court shall thereupon transmit a certificate of such filing to the clerk of the Appellate Court who shall transmit to the clerk of the Supreme Court the same record which was transmitted to the Appellate Court, with a certified copy of the record of the Appellate Court appended thereto. **In case the leave shall not be granted the record shall be returned forthwith to the clerk of the Appellate Court.**" (Emphasis supplied.)

And the only time that the Illinois Supreme Court could stay any mandate is under the situation where it would have granted the Petition for Leave to Appeal. The language pertaining to this procedure, under the rule, is as follows:

> "If the petition shall be granted, the case shall proceed as an appeal, and parties desiring to file briefs shall be governed by Rule 41 (3). **Wherever leave to appeal shall have been granted by the Supreme Court the issuing or enforcement of any mandate of the Appellate Court pursuant to its judgment**, or of any judgment entered in any Court or standing affirmed in any Court, pursuant to the mandate of the Appellate Court, shall be stayed without further order by the Supreme Court until the final disposition of the case by the Supreme Court, but the Supreme Court or a justice thereof in vacation may upon motion in any case otherwise provide or stay the mandate upon such terms as it or he shall fix." (Emphasis supplied.)

Thus it is specifically provided, under the rule above stated, that the Supreme Court of Illinois had no further jurisdiction in the matter when it denied the leave to appeal; that the judgment of the Appellate Court became final at the time of its rendition, and without any further action, by mandate or otherwise, by the Illinois Supreme Court; and that the judgment of the Appellate Court, by

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uch a ruling, was found by the Supreme Court of Illinois
be correct. **By this very action of the Supreme Court**
f Illinois, in denying leave to appeal, it divested itself of
ll jurisdiction in the matter.

In the case of **Soden v. Claney,** 269 Ill., page 98 (109 N.
. 661), the Court on page 101, 102 held:

"By section 121 of the Practice act the judgments or decrees of the Appellate Court are made final in all cases except those wherein appeals and writs of error are specifically required by the constitution to be allowed from the Appellate Courts to the Supreme Court, or in cases where certificates of importance are allowed by the Appellate Court, or in cases which the Supreme Court may require to be certified to it by certiorari or otherwise. **The denial by this court of a petition for certiorari** in a case not required by the constitution to be reviewed by this Court and where a certificate of importance has not been issued by the Appellate Court **makes the judgment of the Appellate Court in that case final.**" (Emphasis supplied.)

Section 121 of the former Illinois Practice Act, cited in the above case of **Soden v. Claney**, is now section 75 of the Illinois Civil Practice Act (Ill. Rev. Stat., 1953, ch. 110, par. 199), and the pertinent part thereof is as follows:

"(1) Appeals shall be taken directly to the Supreme Court in all cases in which a franchise or freehold or the validity of a statute or a construction of the constitution is involved, and in cases in which the validity of a municipal ordinance is involved and in which the trial judge shall certify that in his opinion the public interest so requires, and in all cases relating to revenue, or in which the State is interested as a party or otherwise.

"(2) In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals

are specifically required by the constitution of the State to be allowed from the Appellate Courts to the Supreme Courts, **the judgments or decrees of the Appellate Courts shall be final.**" (Emphasis supplied.)

Said section 75 of the Illinois Civil Practice Act, supra, was construed by the Illinois Supreme Court in the case of **Sales Corp. v. National Mineral Company,** 388 Ill. 281 (57 N. E. 888), the court on page 283 holding:

> "**In all cases in which its jurisdiction is invoked pursuant to law,** except those wherein appeals or writs of error are specifically allowed by the constitution, **the judgments of the Appellate Court are final,** subject to the granting of a leave to appeal by the Appellate Court, with a certificate of importance, **or by the discretionary allowance of an appeal by this court.** Ill. Rev. Stat., 1941, Chap. 110, par. 199, sec. 75." (Emphasis supplied.)

And in the Illinois Appellate Court in the case of **Little v. Chicago Woman's Bowling Ass'n, Inc.**, 344 Ill. App. 65 (99 N. E. 78), the court holding on page 71:

> "After consideration of the able arguments by respective counsel and the authorities cited, **we hold with the position taken by counterdefendants that 'final determination,' as employed in the statute, necessarily means the date the final judgment of the reviewing court becomes final, and not the expiration of the last day for filing petition for rehearing, or the entry of an order denying the petition if one is filed, or the date of entry of the order of the Supreme Court denying leave to appeal.** The authorities are substantially in agreement that the filing of a petition for rehearing **or for leave to appeal,** when accompanied by stay of mandate, merely stays the enforcement of the 'final determination' theretofore reached by the reviewing court by temporarily holding up the is-

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suance of the mandate; **the 'finality' of the prior determination of the reviewing court is not affected.** Dodd and Edmunds, Illinois Appellate Jurisdiction and Practice, sec. 1275."

And on pages 73 and 74 stated:

"In support of their contention that the decision of the Appellate Court was not final until the mandate became available, counterclaimants argue, inter alia, (1) that a delay in disposing of the petition for rehearing would preclude appeal to the Supreme Court; (2) that a longer delay would preclude a successful appellant from filing the mandate within the one year allowed by section 88 (3); and (3) that the mandate having been stayed pending the Supreme Court's determination of the petition for leave to appeal, a delay by that court of over one year in making that determination would preclude compliance with section 88 (3). **An answer to the first of these contentions is that the legislature has provided a different rule for determining finality in the case of an appeal from the Appellate Court to the Supreme Court** (Civil [Practice] Act, section 75, and Supreme Court Rule 32). As to the remaining suggestions, it should be stated that if such delays were to occur, the court would undoubtedly protect the appellant's right to file the mandate under section 88 (3) by vacating its earlier judgment and entering a new one, if requested to do so.

"In view of our conclusion that the Appellate Court's opinion and order of March 1, 1949, was 'the final determination' by the reviewing court within the meaning of section 88 (3) of the Civil Practice Act, the judgment of the superior court in refusing to permit further proceedings in the case because the mandate was not filed in time should be affirmed, and it is so ordered." (Emphasis supplied.)

For this reason the only "final judgment" that is in effect in this cause is that of the Illinois Appellate Court and, therefore, the Writ of Certiorari had to be and could only be issued to said Appellate Court.

There is no requirement under Illinois procedure that a mandate be issued from the Illinois Supreme Court to the Illinois Appellate Court to reinvest the Appellate Court with jurisdiction. Under the applicable rules and procedure, above set out, the Illinois Appellate Court never lost jurisdiction, its judgment was "final" and could only be affected if the Illinois Supreme Court exercised its discretion and **allowed** the appeal.

The question in this case is not where the record is physically lodged, or the right of this court to have the record produced wherever it might be, **but is one of jurisdiction of this court in the first instance.**

The fact that this court granted the writ of certiorari herein does not determine the exercise of jurisdiction, for the issuance of the writ is discretionary. See **Hammerstein v. Superior Court**, 341 U. S. 491, 492, 98 L. Ed. 1135-1137.

In the recent case of **Michigan-Wisconsin Pipe Line Co. v. Calvert**, 347 U. S. 157, 98 L. Ed. 583 (decided in 1953), **which opinion was written by Mr. Justice Clark of this court**, it was therein held in practically an identical situation that the Appellate Court was the court that the writ of certiorari should issue to for the reason **that it was in that court that the final judgment was rendered by the highest court of a state in which a decision could be had**, and two appeals from the Supreme Court of Texas were dismissed for lack of jurisdiction. The court, on pp. 159-160 of 341 U. S., p. 588 of 98 L. Ed., held:

> "By state statute and procedural rule, the docket notation 'refused' in denying application for writ of error signifies that the State Supreme Court deems the

judgment of the Court of Civil Appeals a correct one and the principles of law declared in the opinion correctly determined. Appellants were uncertain whether appeal to this Court was properly from the Court of Civil Appeals or the Supreme Court of Texas, as 'the highest court of a State in which a decision could be had' within the meaning of 28 U. S. C., Sec. 1257. Hence each appellant appealed from each of the courts. **We postponed to the hearing of the cases on the merits a determination of the jurisdictional question.** 346 U. S. 805, 98 L. ed. 335, 74 S. Ct. 119.

"**We think that appeals in these cases were properly from the Court of Civil Appeals.** In American R. Express Co. v. Levee, 263 U. S. 19, 68 L. ed. 140, 44 S. Ct. 11 (1923), the Supreme Court of Louisiana had refused a writ of certiorari to the State Court of Appeal 'for the reason that the judgment is correct.' Mr. Justice Holmes, speaking for a unanimous Court, said:

"'. . . **[U]nder the Constitution of the State the jurisdiction of the Supreme Court is discretionary . . . and although it was necessary for the petitioner to invoke that jurisdiction in order to make it certain that the case could go no farther, . . . when the jurisdiction was declined the Court of Appeal was shown to be the highest Court of the State in which a decision could be had.** Another section of the article cited required the Supreme Court to give its reasons for refusing the writ, and therefore the fact that the reason happened to be an opinion upon the merits rather than some more technical consideration, did not take from the refusal its ostensible character of declining jurisdiction. Western Union Telegraph Co. v. Crovo, 220 U. S. 364, 366. Norfolk & Suburban Turnpike Co. v. Virginia, 225 U. S. 264, 269. Of course the limit of time for applying to this Court was from the date

when the writ of certiorari was refused.' 263 U. S., at 20, 21.

"In Lone Star Gas Co. v. Texas, 304 U. S. 224, 82 L. ed. 1304, 58 S. Ct. 883 (1938), with the present Texas procedural provisions in effect, this Court's mandate issued to the Court of Civil Appeals in a case where the State Supreme Court had 'refused' writ of error. See also United Gas Public Service Co. v. Texas, 301 U. S. 667, 81 L. ed. 1332, 57 S. Ct. 921 (1937).

"**Accordingly the appeals in Nos. 199 and 201, from the Supreme Court of Texas, are dismissed.** We proceed to consider Nos. 198 and 200." (Emphasis supplied.)

Mr. Justice Clark in his opinion in the **Michigan-Wisconsin Pipe Line Company v. Calvert case**, supra, followed the decision of this court in **Amr. Railway Express Company v. Levee**, 263 U. S. 20, 68 L. Ed. 140, the language from said opinion being quoted in the **Michigan-Wisconsin Pipe Line Company v. Calvert case**. This rule followed by Mr. Justice Clark in said case and by Mr. Justice Holmes in the case of **Amr. Railway Express Company v. Levee**, was firmly established in **Norfolk Turnpike Co. v. Virginia**, 225 U. S. 264, 56 L. ed. 1082, where this Court laid down the rule that it now follows, and which appears on page 269 of 225 U. S., and on page 1086 of 56 L. Ed., as follows:

"While, therefore, in this case, for the reasons stated, we entertain jurisdiction, and do not of our own motion dismiss the writ, for the purpose of avoiding the complexity and doubt which must continue to recur, and for the guidance of suitors in the future, we now state that from and after the opening of the next term of this court, where a writ of error is prosecuted to an alleged judgment or a decree of a court of last resort of a state, declining to allow a writ of error to or an appeal from a lower state court, un-

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> less it plainly appears, on the face of the record, by an affirmance in express terms of the judgment or decree sought to be reviewed, that the refusal of the court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits, we shall consider ourselves constrained to apply the rule announced in the Crovo Case, and shall therefore, by not departing from the face of the record, solve against jurisdiction the ambiguity created by the form in which the state court has expressed its action."

In this latter case, this Court put to rest the question of jurisdiction, in the type of case now before this Court, and specifically laid down the rule of law that was followed by Mr. Justice Clark in stating that the writ can only issue to the court wherein **final judgment was rendered**. In this case the only court that a final judgment was rendered in was the Appellate Court for the Fourth District of Illinois.

What judgment was rendered in the Illinois Supreme Court wherein this court could find that it was a final judgment which it could review by a writ of certiorari? The only thing that the Illinois Supreme Court did was to deny a Petition for Leave to Appeal which, in effect, merely stated that the judgment of the Appellate Court was correct. Under the Illinois procedural rules the Illinois Supreme Court could not enter any final judgment and could not stay any mandate because there was nothing to stay. This is shown by the rules of the Illinois Supreme Court and State procedure which it was bound to follow. In view of its holding in the case of **Michigan-Wisconsin Pipe Line Co. v. Calvert**, supra, this court, without any question of a doubt, is without jurisdiction to entertain this proceeding.

Petitioner admits that the Appellate Court for the Fourth District was the correct court for the writ to issue

to, but states that by reason of the fact that the Illinois Supreme Court stayed its mandate that the writ was proper to the Illinois Supreme Court. Under the Illinois procedural law the Illinois Supreme Court, as above stated, had no authority to stay the Appellate Court judgment and any proceedings to secure a stay of mandate would necessarily have to be filed in the Appellate Court. Under the Illinois Supreme Court rules it provides that when leave to appeal was not granted the record shall be returned **forthwith to the clerk of the Appellate Court.** By the Illinois Supreme Court's own rule it denied itself the right to stay any proceedings, but made it automatic that the judgment of the Appellate Court was final and any other proceedings would have to follow in that court and the stay of mandate issued by a Justice of the Illinois Supreme Court was a nullity.

By the judgment of reversal in this cause does the Court mean to reverse the judgment of the Illinois Supreme Court in denying leave to appeal? The ruling certainly cannot apply to the "final judgment" of the Illinois Appellate Court, because the writ of certiorari was not requested to issue to said Court, nor was it ever issued to said Court. Inasmuch as this question is of paramount importance in the final disposition of this case the Court should clarify what judgment it is referring to. This requires a statement of the Court on the jurisdictional question presented. In other words, can this Court by issuing its writ of certiorari to the Illinois Supreme Court, then on reversal, issue its mandate to the Illinois Appellate Court and direct that Court what to do, when no jurisdiction over it has been acquired. We earnestly believe this Court cannot follow such a procedure under its previous holdings.

For the reasons above stated, and as previously argued in our original Brief on Merits as noted above, this Court is without jurisdiction.

Respondent, therefore, submits that this Petition for Rehearing should be granted; that the Per Curiam judgment of reversal entered herein should be set aside; and that the Writ of Certiorari herein should be dismissed.

II.

Under the Common Law and by Virtue of Section 2106 of 28 U. S. C., Federal Appellate Courts Have the Power and Duty to Review Erroneous Findings of Fact Made by a Federal Trial Court and to Remand a Cause for a New Trial, Before Another Jury, Where the Verdict of the Jury Is Erroneous.

The Per Curiam judgment of reversal entered by this Court in this cause on February 14, 1955, citing only **Lavender v. Kurn,** 327 U. S. 645, a "demurrer to the evidence" case (See: Lavender v. Kurn, 354 Mo. 196, 189 S. W. 2d 253), adds further confusion to the already confused and unsettled question as to the "new trial" principles of law which govern the scope of appellate state court review of F. E. L. A. and like Federal Act cases.

Petitioner's first question presented for review (Pet. Br. 3) is as follows:

> 1. Whether the State or Federal law governs the right of a State Appellate Court to set aside a jury's verdict in an action under the "Safety Appliance Act" (45 U. S. C. A., Secs. . . . et seq.), as being contrary to the manifest weight of the evidence?

By its Per Curiam judgment of reversal herein, citing only **Lavender v. Kurn,** 327 U. S. 645, **actually a directed verdict case,** this Court has apparently held that **Federal directed verdict law** controls a State Court Federal Boiler Inspection Act **new trial matter.** That this is so becomes more obvious upon a reading of the three decisions cited by this Court in the **Lavender** case on page 653 of 327 U. S., i. e., **Tiller v. Atlantic Coast Line R. Co.,** 318 U. S.

54, 87 L. ed. 610; **Bailey v. Central Vermont R. Co.**, 319 U. S. 350, 87 L. ed. 1444; **Tennant v. Peoria & P. U. R. Co.**, 329 U. S. 29, 88 L. ed. 520, for in each of these cases this Court **expressly** said it was reviewing a directed verdict ruling.

The Per Curiam judgment of this Court is, therefore, contrary to Section 2106 of 28 U. S. C., to the rules of the common law, to the prior decisions of this Court and to the teachings of Blackstone, as Respondent will briefly show.

Right to common law jury trial is given by controlling Federal or State Constitution and not by F. E. L. A. or other like Federal Act.

This Court has very properly shown great zeal in preserving to injured railroad employees their **common law** right of trial by jury to the extent that in **Bailey v. Central Vermont R. Co.**, supra, 319 U. S. 350, 353, 87 L. ed. 1444, a directed verdict case, it said:

> p. 354 of 319 U. S., p. 1448 of 87 L. ed.: "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' Jacob v. New York, 315 U. S. 752, 86 L. ed. 1166, 62 S. Ct. 854. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act."

It is to be noted that **Jacob v. New York**, cited supra, 315 U. S. 752, 86 L. ed. 1166, a Jones Act case, **relies upon the Seventh Amendment**, which guarantees a jury trial according to the rules of the common law.

However, the defendant railroads have the same right to a jury trial **according to the rules of the common law.** And, according to Blackstone (3 Blackstone's Commentaries, p. 387, 3 Lewis's Ed., p. 1347), one of the rules of the common law provided for the granting of a new trial "if it appears by the judge's report, certified by the Court,

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that the jury have brought in a verdict **without or contrary to the evidence**" . . . (Emphasis supplied.)

At the common law, new trials were first granted **only in the courts of review**, for, at an early date in the development of such common law, the courts ("Common Pleas" and "King's Bench") were centered at Westminster and suit was filed there and then sent to the County where it arose, for trial. The King commissioned one of the judges of the Courts at Westminster to try the case and these trial courts were known as courts of "assize" and "nisi prius." After the trial the "nisi prius" judge returned the record, verdict and proceedings, in the form of a "postea" (entered on the back of the record) to the court at Westminster. The record was then reviewed "en banc" at Westminster and judgment was there entered. **Motions for new trial were made to the court** ("en banc") **at Westminster** (Corcoran v. City of Chicago, 373 Ill. 567, 575-576).

"The exercise of these superintendent powers of the king's courts, in setting aside the verdict of a jury and granting a new trial, on account of misbehavior in the jurors, is of a date extremely ancient. There are instances, in the year books of the reigns of Edward III, Henry IV, and Henry VII. . . . And upon these the chief justice Glynn, in 1665, grounded the first precedent that is reported in our books (Styl. 466) for granting a new trial on account of **excessive damages**" (3 Blackstone's Commentaries, pp. 387, 388—3 Lewis's Ed., p. 1347).

Writ of error for "matter of **law** arising upon the face of the proceedings; so that no evidence is required to substantiate or support it; there being no method of reversing an error in the determination of **facts**, but by an attaint, or a new trial, to correct the mistakes of the former verdict" (3 Blackstone's Commentaries, pp. 406, 407—3 Lewis's Ed., p. 1363) was had from the court of "Common Pleas" at Westminster and from the "King's Bench in

Ireland" to the "King's Bench" in England and the cause was then removable by writ of error to the "House of Lords" (3 Blackstone's Commentaries, p. 411—3 Lewis's Ed., p. 1367).

Blackstone further says "that if any defect of justice happened at the trial, by surprise, inadvertence, or misconduct, the party may have relief **in the court above**, by obtaining a new trial" (3 Blackstone's Commentaries, p. 387—3 Lewis's Ed., p. 1346); and that (3 Blackstone's Commentaries, pp. 390, 391—3 Lewis's Ed., pp. 1349, 1350):

> p. 1349—"If every verdict was final in the first instance, it would tend to destroy this valuable method of trial, and would drive away all causes of consequence to be decided according to the forms of the imperial law, upon depositions in writing, which might be reviewed in a course of appeal."
>
> p. 1349—"Next to doing right, the great object in the administration of public justice should be to give public satisfaction. If the verdict be liable to many objections and doubts in the opinion of his counsel, or even in the opinion of bystanders, no party would go away satisfied unless he had a prospect of reviewing it. Such doubts would with him be decisive: he would arraign the determination as manifestly unjust, and abhor a tribunal which he imagined had done him an injury without a possibility of redress.
>
> "Granting a new trial, under proper regulations, cures all these inconveniences, and at the same time preserves entire and renders perfect that most excellent method of decision which is the glory of the English law. A new trial is a rehearing of the cause before another jury, but with as little prejudice to either party as if it had never been heard before. No advantage is taken of the former verdict on the one side, or the rule of court for awarding such second trial on the other: and the subsequent verdict, though

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contrary to the first, imports no tittle of blame upon the former jury, who, had they possessed the same lights and advantages, would probably have altered their own opinion. The parties come better informed, the counsel better prepared, the law is more fully understood, the judge is more master of the subject: and nothing is now tried but the real merits of the case."

ee also (cited on page 23 of Respondent's Brief on lerits):

Illinois decisions:

Corcoran v. City of Chicago, 373 Ill. 567, 575-580, 27 N. E. 2d 451, appeal dismissed 311 U. S. 610, 85 L. ed. 386, rehearing denied 311 U. S. 727, 85 L. ed. 473—reviews common law authorities, cites and quotes (pp. 577-578) **Bright v. Eynon** (King's Bench, 1757), 1 Burrows, 391 and cites (p. 580) **Smith v. Times Publishing Co.**, 178 Pa. St. 481, 36 Atl. 297;

Olson v. Chicago Transit Authority, 1 Ill. 2d 83, 85, 86.

Federal decisions:

Aetna Casualty & Surety Co. v. Yeatts (4 Cir., 1941), 122 F. 2d 350, 352-354 (Parker, J.) citing Felton v. Spiro (6 Cir.), 78 F. 576;

Virginian Ry. Co. v. Armentrout (4 Cir., 1948), 166 F. 2d 400, 408 (Parker, J.);

Garrison v. United States (4 Cir., 1932), 62 F. 2d 41, 42 citing: **Felton v. Spiro** (C. C. A. 6th), 78 F. 576; Mt. Adams & E. P. Inclined R. Co. v. Lowery (C. C. A. 6th), 74 F. 463;

Felton v. Spiro (6 Cir., 1897), 78 F. 576;

Mt. Adams & E. P. Inclined R. Co. v. Lowery, 6 Cir., 1896, 74 F. 463, 465-477, **Lurton, J.**

The antipathy of trial court juries toward railroad orporations is matter of common knowledge and, in the

ordinary F. E. L. A. jury trial, the only common law rule and right of real beneft to such a corporation is its right to a new trial if the verdict of the jury is against the manifest or clear weight of the evidence, or is excessive, or, for any other reason, is unjust.

The Per Curiam judgment of this Court in this cause wrongfully denies Respondent this valuable common law right, even though the Seventh Amendment does not apply to this state court Federal Boiler Inspection Act cause (Pearson v. Yewdall, 95 US 294, 296, 24 L. ed. 436, 437; Minneapolis & St. L. R. Co. v. Bombolis, 241 US 211, 217, 60 L. ed. 961, 963; Brady v. Southern R. Co., 320 US 476, 479, 88 L. ed. 239, 242), even though this court has held that state courts shall administer such cases "in accordance with the modes of procedure prevailing in such [state] courts" (Minneapolis & St. L. R. Co. v. Bombolis, 241 US 211, 218, 60 L. ed. 961, 963, 964) and even though it has promulgated Rule 59, Fed. Rules Civil Procedure, which treats new trials in the Federal Courts **as a procedural matter.**

Moreover, such Per Curiam judgment is directly contrary to said Section 2106 of 28 U. S. C., which confers even greater powers of review on the Federal Appellate Courts than is conferred on the Illinois Appellate Courts by Section 92 (3) (b) of the Illinois Civil Practice Act [Ill. Rev. Stat. 1953, Ch. 110, par. 216 (3) (b)—**partially** quoted at page 6 of Respondent's Brief on Merits].

The controlling effect and meaning of said Section 2106 is eloquently and clearly stated by Judge Edwin R. Holmes of the 5th Circuit in his two dissenting opinions (concurred in by Judge Leon McCord) in **Sunray Oil Corporation v. Allbritton**, reported in 187 F. 2d 475 and in 188 F. 2d 751, both cited at page 54 of Respondent's Brief on Merits.

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Since the Per Curiam judgment of this Court in this ause shows that it has entirely misapprehended and verlooked the real issue under discussion, i. e., the right f an appellate court to remand a cause for a new trial, y its application of Federal directed verdict law to this ew trial cause, and as a convenience to this Court, Re-pondent will briefly discuss such two dissenting opinions.

In his first dissenting opinion in the **Sunray Oil** case, upra, 187 F. 2d 475, Judge Holmes points out (page 78) that under Section 22 of the Judiciary Act of 1789* **See**: 28 U. S. C. (1941 Ed.) 879] "No reversal upon writ f error was permissible in the Supreme Court for any error of fact;" that when writs of error were abolished 28 U. S. C. (1941 Ed.) 861a, 861b]* and appeals sub-tituted therefor, it was expressly provided that appeals hould be subject to the same rules, regulations and re-trictions, as were previously prescribed in law in cases f writ of error [Title 28 U. S. C. (1941 Ed.) 880);* and hat this statutory limitation on federal appellate power was repealed in 1948 (Ch. 646, § 39—"Schedule of Laws Repealed" 62 Stat. 992).

In his second dissenting opinion in the **Sunray Oil** case, supra, 188 F. 2d 751, Judge Holmes first quoted the **Pepper** case, 5 Cir. 1951, 187 F. 2d 71 (quoted page 53 of Respondent's Brief on Merits) and the **Armentrout** case, supra, 4 Cir. 1948, 166 F. 2d 400 (quoted pages 51-53 of Respondent's Brief on Merits) and pointed out that at the common law the appellate King's Bench re-examined the facts, directly and then said:

> p. 753—"By Sec. 22 of the Judiciary Act of 1789,* federal appellate courts were forbidden to do this; but by Sec. 2106 of the Judiciary Code of 1948, 28 U. S. C. A. they were required to do it, since the 7th Amendment impliedly authorizes the re-examination

* Quoted in Appendix.

of any fact tried by a jury except otherwise than in accordance with the rules of the common law. The procedure of striking at the jurors' misbehavior over the shoulders of the trial judge was devised to prevent injustice because of the statutory restriction on appellate power. The old statute having been superseded, the reason for the devise has ceased." . . .

p. 755—"The statutory provision against reversals in jury cases for any error in fact remained on the books for 159 years; and, during that period, the federal courts lost the use of an ancient common-law appellate power. This power, in our opinion, may be compared to an arm that has become atrophied; even legislation like said Sec. 2106 cannot fully restore it; only a decision of the Supreme Court can cure it completely." . . .

p. 756—"Under Section 2106 of New Title 28, U. S. Code, what was said by the Supreme Court in Capital Traction Co. v. Hof, 174 U. S. 1, 13, 19 S. Ct. 580, 585, 43 L. Ed. 873, with reference to the power of trial courts to set aside verdicts and grant new trials, now applies to appellate federal Courts [i. e., the power 'to set aside their (jury) verdict, if . . . it is against the law **or the evidence**' (emphasis supplied)].

. . . So far as they affected jury trials, six little words in the Judiciary Act of 1789[1] (Footnote 1. 'Or for any error in fact.' 28 U. S. C. 879, R. S. 1011, 18 stat. 318) survived the vicissitudes of many legislative changes, and for over a century and a half escaped the sickle of revisors, codifiers, rule makers, but finally they succumbed to the deft touch of the 1948 codifiers in their 'Schedule of Laws Repealed': and all the king's horses and all the king's men cannot put them back again in their little niche without an Act of Congress; but the Seventh Amendment remains intact, and champions of the jury system have

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nothing to fear if the federal courts will adhere to the essential principles of trial by jury at common law, in 1791, as required by said Amendment."

Having in mind that **Garrison v. United States**, supra, 4 Cir., 1932, 62 F. 2d 41, is the first of Chief Judge Parker's opinions* pointing out the distinction between the powers of the court, as to weighing the evidence and judging the credibility of witnesses, in passing upon a motion for directed verdict or for judgment n. o. v. and in passing upon a motion for a new trial, the attention of this court is invited to the majority and minority opinions of this court in **Galloway v. United States**, 319 U. S. 372, 87 L. ed. 1458, rehearing denied, 320 U. S. 214, 87 L. ed. 1851.

In that case the majority of this Court, in affirming a directed verdict in favor of the United States, in a suit upon a policy of War Risk Insurance, speaking through the late Mr. Justice Rutledge, said:

p. 390 of 319 U. S., p. 1470 of 87 L. ed.:

> . . . "The jury was not absolute master of fact in 1791. Then as now courts excluded evidence for irrelevancy and relevant proof for other reasons. The argument concedes they weighed the evidence, not only piecemeal but in toto for submission to the jury, by at least two procedures, the demurrer to the evidence and the motion for a new trial."

The minority opinion by Mr. Justice Black, with whom Mr. Justices Douglas and Murphy concurred, states:

p. 411 of 319 U. S., p. 1482 of 87 L. ed.:

> . . . "If, as the Court believes, insufficient evidence has been offered to sustain a jury verdict for the petitioner, we should at least authorize a new trial. Cf.

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* See: Aetna Casualty & Surety Co. v. Yeatts, 122 F. 2d 350, 352, 353; Virginian Ry. Co. v. Armentrout, 166 F. 2d 400, 408, 409; Snead v. New York Central Railroad Company, 216 F. 2d 169.

Garrison v. United States (C. C. A., 4th), 62 F. 2d 41, 42.

It is, therefore, apparent that at least two of the present members of this Court have been of the opinion that **this Court** has the power to "authorize a new trial" where "insufficient evidence has been offered to sustain a jury verdict for the petitioner." This is, of course, the contention here made by Respondent that has been overlooked by this Court.

At pages 5 and 6 of his Reply Brief on Certiorari and at page 2 of his Reply Brief on Merits the Petitioner herein argues that F. E. L. A., Federal Boiler Inspection Act and Federal Safety Appliance Act cases, are **above and not subject in any way to** the regular Federal rules relating to the granting of new trials in other types of cases tried before juries in the Federal Courts. And at page 6 of his Reply Brief on Certiorari he says:

> "True, in other types of cases, such liberty is allowed and respondent has cited some of these. In fact, at page 13, it cites the case of Charles v. Norfolk and Western Ry. Co., 188 F. 2nd 691, which by virtue of its title might be inferred to be an action under the act. However, upon reading this case it is found it involves an action by a negro passenger for assault and battery, etc., against the railway."

The Per Curiam judgment of this court in this cause perhaps indicates that this court agrees with this novel and astonishing argument. If this court does agree with this "double standard" contention and argument, and is so holding in this cause, Respondent respectfully submits that, in fairness to Respondent and to the Illinois Appellate Court that heard this cause, and as a service to the Bench and Bar of this Country, it should give its reasons in a formal written opinion. If injured railroad employees are in a special category, above, beyond and not subject

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in any way to, the new trial rules governing all other litigants, this court should so state, so that the Congress, the Bench and Bar and the defendant railroads will know the true situation.

If, on the other hand, this Court sees fit to heed the teachings of Blackstone and elects to abide by and follow said section 2106 of 28 U. S. C., it will grant a rehearing in this cause and affirm the judgment of the Illinois Appellate Court. In so doing this Court will restore "an ancient common-law power" to itself and to the Appellate Courts, for as said by Judge Holmes in the **Sunray Oil** case, supra, 188 F. 2d 751, 755—"even legislation like said Sec. 2106 cannot fully restore it; only a decision of the Supreme Court can cure it completely."

Respondent further invites the attention of this court to the plight of the Illinois Appellate Court that heard this cause, for this particular Illinois Appellate Court hears appeals from Madison and St. Clair and nearby Counties, an industrial area in Illinois second only to Chicago and Cook County, and reviews many F. E. L. A. and like Federal Act cases.

Petitioner concedes (p. 12, Pet. Brief on Merits) that the Illinois Appellate Court had the power to remand for a new trial under Illinois law. This Court has reversed the Illinois judgment, citing only **Lavender v. Kurn**, 327 U. S. 645, a 1945 directed verdict case, in the face of the clear fact that Section 2106 of 28 U. S. C., enacted three years later (1948), gives Federal Appellate Courts like powers of review and remandment.

Certainly this and the other Illinois Appellate Courts, as well as the Appellate Courts of the other states, are entitled to a formal opinion which will clear the atmosphere and fully, correctly and accurately inform them of their "new trial" powers and duties in reviewing F. E. L. A. and like Federal Act cases.

In **Fairmount Glass Works v. Cub Fork Coal Co.**, 287 U. S. 474, 77 L. ed. 439, this Court in explaining its rule that it "will not review the action of a federal trial court in granting a motion for a new trial for error of fact" said:

pp. 481-482 of 287 U. S., pp. 443-444 of 77 L. ed.:

"The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals. **Its early formulation by this Court was influenced by the mandate of the Judiciary Act of 1789, which provided in § 22** that there should be 'no reversal in either [circuit or Supreme] court on such writ of error . . . **for any error in fact.**" Sometimes the rule has been rested on that part of the Seventh Amendment which provides that 'no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.' More frequently the reason given for the denial of review is that the granting or refusing of a motion for a new trial is a matter within the discretion of the trial court.

"It has been suggested that a review must be denied because of the historical limitation of the writ of error to matters within the record, of which the motion for a new trial was not a part. Compare Judge Learned Hand in Miller v. Maryland Casualty Co. (C. C. A. 2d), 40 F. (2d) 463. But the denial of review can no longer rest upon this ground, since the record before the appellate court has been enlarged to include in the bill of exceptions a motion for a new

trial, made either before or after judgment. Compare Harrison v. United States (C. C. A. 2d), 7 F. (2d) 259, 262. Under certain circumstances the appellate court may enquire into the action of the trial court on a motion for a new trial." (Emphasis supplied.)

Section 22 of the Judiciary Act of 1789 was repealed in 1948 (Ch. 646, § 39—"Schedule of Laws Repealed"—62 Stat., p. 992), as Judge Holmes points out in his second **Sunray Oil** case opinion, supra, 188 F. 2d at 756, and such statutory prohibition against reviewing "error of fact" **no longer exists.** The historical "procedural" limitation of writ of error, of which the motion for a new trial was not a part, no longer bars review (Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474, 482, 77 L. ed. 439, 444; Southern Pac. Co. v. Gutherie, 9 Cir., 1949, 180 F. 2d 295, 303-306, certiorari denied, 341 U. S. 904; Bucher v. Krause, 7 Cir., 1953, 200 F. 2d 576, 585-587, certiorari denied, 345 U. S. 997, rehearing denied, 346 U. S. 842). This Court has squarely held that the denial of a new trial is reviewable "for a plain abuse of—discretion" (United States v. Socony Vacuum Oil Co., 310 U. S. 150, 247, 248, 84 L. ed. 1129, 1180, 1181) or "when the findings of fact are wholly unsupported by evidence" (United States v. Johnson, 327 U. S. 106, 111, 112, 90 L. ed. 562, 565, 566).

Respondent, therefore, respectfully refers this Court to pages 45-59 of its Brief on Merits and submits that under the authorities there cited, under Section 2106 of 28 U. S. C. and under **the true rules of the common law,** this Court has the clear duty to sustain the right and duty of Appellate Courts to remand for a new trial, where the verdict of the jury is against the clear or manifest weight of the evidence, or where justice so requires.

For the foregoing reasons Respondent submits that this Petition for Rehearing should be granted; and that on such Rehearing the writ of certiorari herein should be

dismissed or, in the alternative, that the now final judgment of the Illinois Appellate Court should be affirmed.

Respectfully submitted,

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Certificate.

I, Fred P. Schuman, an attorney of the Bar of the Supreme Court of the United States, hereby certify that the above and foregoing Petition for Rehearing is presented in good faith and not for delay.

Granite City, Illinois, March ...., 1955.

.....

Fred P. Schuman,
1308a Niedringhaus Avenue,
Granite City, Illinois.

APPENDIX.

28 U. S. C. (1941 Ed.), Section 861a, 861b, 879 and 880 read as follows:

861a. Writ of error abolished; substitution of appeal.

The writ of error in cases, civil and criminal, is abolished. All relief which prior to January 31, 1928, could be obtained by writ of error shall hereafter be obtainable by appeal. (Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54.)

861b. Statutes governing writs of error to apply to appeals.

The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which section 861a of this title substitutes for a writ of error. (Jan. 31, 1928, ch. 14, § 2, 45 Stat. 54; Apr. 26, 1928, ch. 440, 45 Stat. 466.)

879. Reversal on former error limited.

There shall be no reversal in the Supreme Court or in a circuit court of appeals upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact. (R. S. § 1011; Feb. 18, 1875, ch. 80, § 1, 18 Stat. 318.)

"Derivation

Acts Sept. 24, 1789, Ch. 20, § 22, 1 Stat. 84; Mar. 2, 1803, Ch. 40, § 2, 2 Stat. 244.

Writs of Error Abolished

Writs of error were abolished and appeal substituted therefor by sections 861a and 861b of this title"

880. Appeals from district courts; applicability of same rules, etc, as writs of error.

Appeals from district courts shall be subject to the same rules, regulations, and restrictions as were prior to January 31, 1928, prescribed in law in cases of writs of error. (R. S., § 1012; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167.)

No. 125. HARSH *v.* ILLINOIS TERMINAL RAILROAD CO. Certiorari, 348 U. S. 809, to the Supreme Court of Illinois. Argued February 8, 1955. Decided February 14, 1955. *Per Curiam:* Judgment reversed. *Lavender* v. *Kurn*, 327 U. S. 645. *Morris B. Chapman* argued the cause and filed a brief for petitioner. *Fred P. Schuman* and *Harold G. Talley* argued the cause for respondent. With them on

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the brief were *George D. Burroughs* and *Gordon Burroughs*. Reported below: See 351 Ill. App. 272, 114 N. E. 2d 901.